SUPREME COURT, U.S.
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In The Supreme Court of the United States

October Term, 1997

TOWNSHIP OF LELAND; VILLAGE OF NORTHPORT
Petitioners,

v.

GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

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QUESTIONS PRESENTED

In 1994, the Grand Traverse Band of Ottawa & Chippewa Indians ("the Tribe") brought suit against Petitioners and the Director of the Michigan Department of Natural Resources, contending that the Tribe's implied right of access to the waters of the Great Lakes, a corollary to the Tribe's implied right to fish found in the 1836 Treaty of Washington, 7 Stat. 491, included the right to moor large tribal commercial fishing vessels at recreational marinas owned and operated by the municipalities, notwithstanding a nondiscriminatory prohibition on the mooring of commercial fishing vessels at these recreational marinas. The questions presented are:

1. Whether the decision by a divided panel of the Sixth Circuit Court of Appeals conflicts with decisions of this Court because the court of appeals rewrote Treaty provisions to expand an implied right to fish to include the right to moor commercial fishing vessels in marinas constructed by third parties more than 130 years after the Treaty was signed.

2. Whether the court of appeals correctly expanded implied off-reservation Treaty rights to grant tribal members the right to occupy public and private lands not owned by the Tribe or its members.

3. Whether this Court should resolve a conflict between the Courts of Appeals for the Sixth and Ninth Circuits and address the important federal question of whether attorney fees may be awarded pursuant to 42 U.S.C. § 1988 in cases where a federal court is interpreting treaties to determine the scope of reserved rights.

PARTIES TO THE PROCEEDINGS

Petitioners, Defendants-Appellants below, are the Township of Leland and Village of Northport. Also a Defendant below is the Director of the Michigan Department of Natural Resources.

Respondent, Plaintiff-Appellee below, is the Grand Traverse Band of Ottawa and Chippewa Indians.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDINGS iii

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Historical Background 2

II. The Present Conflict 4

III. The Fee Issue 6

REASONS FOR GRANTING THE PETITION 7

I. THE COURT OF APPEALS' DECISION TO EXPAND AN IMPLIED RIGHT OF ACCESS TO A RIGHT OF OCCUPANCY FLATLY CONTRADICTS DECISIONS OF THIS COURT 8

A. By Finding a Tribal Right to Moor, the Court of Appeals Dramatically Expanded the Scope of Rights Reserved to the Tribe by the Treaties . 8

B. The Court of Appeals' Decision Conflicts with Decisions of this Court Holding that a Court May Not Rewrite or Expand Treaties and Must Apply a Rule of Sensible Construction 12

C. The Importance of the Federal Question Addressed in this Case Justifies the Issuance of a Writ of Certiorari 14

D. The Consent Decree Does Not Provide an Alternative Basis for Granting New Rights to the Tribe 16

II. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION TO AWARD ATTORNEY FEES CANNOT BE RECONCILED WITH THE NINTH CIRCUIT COURT OF APPEALS' SUPERIOR DOCTRINE THAT FEES MAY ONLY BE AWARDED IN CASES INVOLVING "KNOWN AND WELL-DELINEATED" TREATY RIGHTS 18

A. The Court of Appeals' Decision Directly Conflicts with Ninth Circuit Decisions in *U.S. v. Washington* 18

B. The Ninth Circuit's Approach to Fee Awards in Treaty Cases Advances Superior Public Policy and Legal Doctrine. 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Choctaw Nation of Indians v. United States,
318 U.S. 423, 431-32 (1943) 8, 12

Golden State Transit Corp. v. Los Angeles,
493 U.S. 103, 107 (1989) 25

Lac Courte Oreilles Band of Lake Superior
Chippewa Indians v. State of Wisconsin,
653 F. Supp. 1420, 1431 (W.D. Wisc. 1987) 14

Maine v. Thiboutot,
448 U.S. 1, 9 (1980) 19

Maryland Pest Control Ass'n. v.
Montgomery County, Maryland,
884 F.2d 160, 163 (4th Cir. 1989),
cert. den., 494 U.S. 1056 (1990) 25

Mille Lacs Band of Chippewa Indians
v. State of Minnesota, 853 F.
Supp. 1118, 1144-45 (D. Minn. 1994) 10, 13

Oklahoma Tax Commission v. Chickasaw Nation,
515 U.S. 450 (1995) 12

Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985) .. 12

People v. LeBlanc, 248 N.W.2d 199 (Mich. 1976) 3

Sokaogon Chippewa Community v. Exxon Corp, 805 F. Supp. 680, 700 (E.D. Wisc. 1992), aff'd., 2 F.3d 219 (7th Cir. 1993), cert. den., 510 U.S. 1196 (1994) 9, 10, 14

South Dakota v. Yankton Sioux Tribe, 66 U.S.L.W. 4092 (U.S. Jan. 26, 1998) 12

State of Minnesota v Mille Lacs Band of Chippewa Indians, cert. granted, 66 U.S.L.W. 3781 (U.S. June 8, 1998) (No. 97-1337) 12

United States v. Choctaw Nation, 179 U.S. 494, 533 (1900) 12

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd., 653 F.2d 277 (6th Cir. 1981), cert. den., 454 U.S. 1124 (1981) 2, 3, 9, 21

United States v. Michigan, 623 F.2d 448 (6th Cir. 1980), modified, 653 F.2d 277 (6th Cir. 1981), cert. den., 454 U.S. 1124 (1981) 3, 21

United States v. Washington, (Washington I),
813 F.2d 1020, 1022-23 (9th Cir. 1987),
cert. den., 485 U.S. 1034 (1988) 7, 19-22

United States v. Washington, (Washington II),
873 F.2d 240 (9th Cir. 1989) 19, 20, 24

United States v. Washington, (Washington III),
935 F.2d 1059 (9th Cir. 1991) 19, 21, 24

United States v. Winans,
198 U.S. 371 (1905) 8

Washington v. Fishing Vessel Ass'n.,
443 U.S. 658 (1979) 14, 19, 20

White Mountain Apache Tribe v. Williams,
810 F.2d 844, 852 (9th Cir. 1987) 25

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1343(a) and 1362 4

42 U.S.C. § 1983 ..... 4-7, 19, 25

42 U.S.C. § 1988 ..... 18, 19, 25

Other

Supremacy Clause, U.S. Const., art. VI. cl.2 . . . . . 1, 25

Treaty of Detroit, 11 Stat. 621 . . . . . 1, 2

Treaty of Washington, 7 Stat. 491 . . . . . ii, 1, 2

OPINIONS AND JUDGMENTS BELOW

The first court of appeals opinion is reported at 141 F.3d 635 (6th Cir. 1998) and reprinted in the appendix ("App.") at 1. The second court of appeals opinion is an unreported decision, Nos. 96-2396/96-2466 (6th Cir. July 1, 1998) reprinted at App. B. These two judgments, which involve closely related questions and are therefore properly addressed in a single petition for a writ of certiorari pursuant to Supreme Court Rule 12.4, affirmed orders and rulings of the District Court for the Western District of Michigan reprinted at App. E1-E6.

JURISDICTION

The court of appeals entered its judgment on April 15, 1998. App. A. A timely petition for rehearing with suggestion for rehearing en banc was denied on June 10, 1998. App. C. The second judgment of the court of appeals was entered on July 1, 1998. App. B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following treaty, constitutional, and statutory provisions: Treaty of Detroit, 11 Stat. 621; Treaty of Washington, 7 Stat. 491; U.S. Const., art. VI, cl. 2; and 42 U.S.C. §§ 1983 and 1988. App. D.

STATEMENT OF THE CASE

The Tribe is a recognized successor to signatories of 1836 and 1855 Treaties with the United States and, as such, enjoys an implied Treaty-reserved right to fish in certain waters of the Great Lakes. United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd., 653 F.2d 277 (6th Cir. 1981), cert. den., 454 U.S. 1124 (1981). The Tribe claims that the Municipalities violated this right by enforcing nondiscriminatory regulations preventing the mooring of commercial fishing vessels at the Municipalities' recreational marinas. The Tribe also claims that enforcement of the regulations violated a 1985 Consent Decree of the District Court, which was entered into by, *inter alia*, the Tribe and the State of Michigan, but not by the Municipalities.

I. Historical Background.

In 1836, the "Ottawa and Chippewa Nations" entered into a treaty with the United States, by which the tribes ceded to the United States much of what is now the State of Michigan. Treaty of Washington, 7 Stat. 491 ("1836 Treaty"). Article 13 of this Treaty provides that "the Indians stipulate for the right of hunting on the land ceded, with the other usual privileges of occupancy, until the land is required for settlement." App. at D. In 1855, the tribes entered into a second treaty by which they reserved specific tracts of land. Treaty of Detroit, 11 Stat. 621 ("1855 Treaty"). Those specifically described reservation lands include lands adjacent to the Leland and Northport marinas, but they do not

include the lands, or bottomlands, upon which the marinas now sit. App. at D.[1]

In the 1970s, extensive litigation confirmed that, under the 1836 and 1855 Treaties, the Tribe had reserved the right to fish. People v. LeBlanc, 248 N.W.2d 199 (Mich. 1976); United States v. Michigan, 471 F. Supp. 192. "In the 1836 treaty, the Ottawa and Chippewa understood that they could continue to use the land to the extent necessary to continue to live [as fishers]." United States v. Michigan, 471 F. Supp. at 238. Accordingly, "the Indians impliedly reserved a right to fish . . . in the ceded waters of the Great Lakes." Id. at 258. In defining the parameters of this implied right, the court held that although the Tribe is not limited to the use of primitive technologies, "the scope of the Indian right to fish at the present time is defined by the character of Indian fishing at the time of the treaty" because treaty fishing rights are rights that were reserved out of rights existing at the time of the treaties. Id. at 259.

After confirming the treaty right to fish, the court of appeals remanded the case to the district court for a determination of the propriety of attempted regulation of the right by the State of Michigan. United States v. Michigan, 623 F.2d 448 (6th Cir. 1980), modified, 653 F.2d 277 (6th Cir. 1981), cert. den., 454 U.S. 1124 (1981). That litigation culminated in the entry of a 1985 Consent Decree in which various tribes and other parties agreed to

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[1]The Tribe concedes, for purposes of this litigation, that "neither the Tribe nor its members is asserting any ownership rights in the property occupied by the Leland or Northport marinas . . . " App at F4.

implement a zoning system for the Great Lakes that, *inter alia*, assigned certain "grids" of the lake to treaty fishers and other grids to other parties, including the State of Michigan. See, App. at A.

II. The Present Conflict.

A recreational marina owned and operated by the Township of Leland was constructed beginning in 1967 and a recreational marina owned and operated by the Village of Northport was expanded between 1982 and 1989. App. at F2. Both marinas consist of breakwalls surrounding docks within dredged areas of artificially-created harbor that were previously unprotected from the open waters of Lake Michigan. Although both marinas prohibit the mooring of commercial fishing vessels, the Municipalities permit all vessels, including the Tribe's commercial fishing vessels, to utilize access ramps at the marinas free of charge. App. at F2 and F3.[2]

In this case, the Tribe alleged that the prohibition on the mooring of tribal commercial fishing vessels at the marinas violates the Tribe's right to fish. App. at F1. The Tribe also brought two claims under 42 U.S.C. § 1983, for violation of the equal protection clause and deprivation of property rights without due process of law. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1343(a) and 1362.

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[2]The marinas also serve as harbors of refuge to all vessels. App. at F2 and F3.

In resolving cross- motions for summary judgment, the district court agreed with the Tribe's primary contention, finding that the tribal right to fish includes the right to access traditional fishing grounds and that the Treaties fixed such "implied" easements as would enable this fishing right to be exercised. App. at E1. The court further held that this implied easement of access, allowing the Tribe to "meaningfully fish from traditional areas," includes a right to moor tribal commercial vessels at the marinas notwithstanding the general prohibitions against commercial use. Id.

The court of appeals, in a majority opinion authored by Judge Nathaniel Jones, affirmed the district court. The majority concluded that, in keeping with the principle that treaties are to be construed "liberally in favor of Native Americans," "the 1836 and 1855 treaties provided for an easement of access" that of necessity includes the right to moor in the Municipalities' marinas. App. at A. The court also concluded that, by prohibiting the mooring of tribal commercial fishing vessels at their marinas, the Municipalities were improperly interfering with the Consent Decree binding the Tribe, the state and other parties. Judge James Ryan dissented, noting that "the term 'access' simply does not denote 'mooring,'" and that the logical result of the court's ruling would be to give the Tribe a "right to moor its boats at every marina to be built hereafter at any location on the shoreline." Id.

III. The Fee Issue.

In addressing the Tribe's 42 U.S.C. § 1983 claims, the district court dismissed the equal protection claim and questioned the due process claim in a footnote, stating that:

> GTB's 18 [*sic*] U.S.C. § 1983 claim for deprivation of property without due process will not be resolved herein. The GTB has not briefed, and the defendants have not had an opportunity to respond to, the merits. To the extent that the GTB claims the consent decree as a source in itself of a property right, the claim cannot be made. Assuming that a § 1983 claim can be made for a treaty-based property right, whether the claim is one for a procedural due process violation under the 14th amendment simpliciter, or for a substantive due process violation, the defendants should have an opportunity to be apprised of, and respond to, the nature of the plaintiff's claim or claims. App. at E1 (citations omitted).

The Tribe subsequently abandoned this claim, yet filed a motion seeking fees for all work performed in the course of the litigation.

In response to the Tribe's request for fees, the Municipalities argued that the court should adopt the position of the Court of Appeals for the Ninth Circuit, which held in a procedurally identical case that attorney fees are available in treaty cases only if the rights involved are "known and well-delineated,"

and not in treaty interpretation cases. United States v. Washington, 813 F.2d 1020, 1023 (9th Cir. 1987). The district court disagreed with the position of the Municipalities by attempting to distinguish Washington, and then awarded the Tribe $98,518 in fees. App. at E6. The court of appeals simply "declined to decide" whether to adopt the Ninth Circuit's test. App. at B. The court of appeals then affirmed the fee award, ruling that the unaddressed 42 U.S.C. § 1983 claim was a basis for awarding fees. Id.

REASONS FOR GRANTING THE PETITION

This case presents issues of critical importance to the developing body of Supreme Court jurisprudence concerning tribal rights. Although state and local governments have long been required to recognize rights reserved by Indian tribes in ancient treaties, this case radically changes the degree to which the rights of state and local governments and other private property owners are subservient to implied tribal rights. The decisions below have broad impacts reaching far beyond the Petitioner Municipalities, the tribes that are parties to the treaties involved in this case, and the State of Michigan. If these decisions are allowed to stand, not only will these Municipalities be forced to allow occupancy of, as distinguished from mere access through, their marinas, but other property owners, both public and private, may be required to allow tribal members to occupy improvements to their real estate. Furthermore, state and municipal governments, faced with the threat of liability for significant attorney fees, will lose the ability to sensibly evaluate and respond to tribal demands for new rights. Significantly, the decisions below either flatly contradict or ignore

this Court's own rulings or conflict with superior decisions of other circuit courts of appeal.

I. THE COURT OF APPEALS' DECISION TO EXPAND AN IMPLIED RIGHT OF ACCESS TO A RIGHT OF OCCUPANCY FLATLY CONTRADICTS DECISIONS OF THIS COURT.

In deciding that tribal fishers have a right to moor commercial fishing vessels at the Municipalities' marinas, the lower courts found that mooring rights are included within the scope of rights reserved in the 1836 and 1855 Treaties. Treaty rights, however, are reserved rights and, because no right to appropriate the use of structures constructed by non-Indians existed at the time of the treaties, it is impossible for the tribes to have reserved such a right. Further, any right to moor far exceeds the boundaries of the right to fish ***impliedly*** reserved in the 1836 and 1855 Treaties. In finding a right to moor, the court of appeals exceeded its power and ran afoul of this Court's jurisprudence by rewriting and expanding the Treaties beyond any sensible construction.

A. By Finding a Tribal Right to Moor, the Court of Appeals Dramatically Expanded the Scope of Rights Reserved to the Tribe by the Treaties.

As noted supra, "[t]he scope of the Indian right to fish at the present time is defined by the character of Indian fishing at the time of the Treaty." United States v. Michigan, 471 F. Supp. at 259, citing, Choctaw Nation of Indians v. United States, 318 U.S.

423, 431-32 (1943). Courts interpreting the phrase "usual privileges of occupancy," the literal reservation of rights contained within the 1836 Treaty, have held that those privileges involve uses of property exercised as of the time of the treaty. See, e.g., Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 700 (E.D. Wis. 1992), aff'd., 2 F.3d 219 (7th Cir. 1993), cert. den., 510 U.S. 1196 (1994). Such an interpretation naturally results from the fact that the rights enjoyed by tribal members under treaties are not rights that were granted by the United States, but rights that the Tribes possessed at the time of the treaty and retained for themselves. United States v. Michigan, 471 F. Supp. at 212-13, relying upon United States v. Winans, 198 U.S. 371 (1905).

Given the "reserved" nature of treaty rights, it is apparent that no right to moor could have been included among the rights secured by the 1836 and 1855 Treaties. As the Municipalities pointed out below, neither the perceived need for moorage for large steel-hulled vessels nor the recently constructed artificial facilities at issue in this lawsuit could have been foreseen by the signatories to the 1836 and 1855 Treaties. The Tribe and the lower courts did not take issue with this statement or point to any evidence to the contrary; rather, the court of appeals simply declared that because dockage for large vessels was "needed" to enable the Tribe to fish certain areas, the tribal right of access includes dockage rights. App. at A.[3]

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[3]The court of appeals stated that an inability to dock tribal fishing vessels at the Municipalities' two marinas "would simply destroy all rights to commercially fish that were conveyed by [the Treaties]." App. at A. There is ***no*** record support for this

In concluding that mooring is guaranteed by the Treaties, the court of appeals ***created*** a type of right that did not exist in 1836 or 1855 – a right to appropriate improvements to real property over which the Tribe does not have title. Judge Ryan, in dissent, recognized the fundamental flaw in the majority's logic: "the term 'access' simply does not denote 'mooring.'" App. at A. The newly-created right to moor far exceeds any mere right of access; the lower courts have given tribal fishers the right to occupy the Municipalities' property, rather than the right to simply cross that property to access the "unsettled" waters of the Great Lakes.

Recognizing the significant distinction between usufructuary rights and occupancy rights, other federal courts have correctly ruled that "coming on to property and living there, however briefly, is more invasive than hunting or fishing on that property, and suggests an ownership interest rather than a license or profit à prendre." Sokaogon Chippewa Community, 805 F. Supp at 704. A mere right of access, however, is not an interest in property; indeed, it is not even a "cloud on title." See, e.g., Mille Lacs Band of Chippewa Indians v. State of Minnesota, 853 F. Supp. 1118, 1144-45 (D. Minn. 1994). There is no fundamental difference between the right to moor at a marina and the right to camp on property discussed and rejected in the Sokaogon case. The "rights" granted tribal fishers in this case are clearly occupancy rights that are far different than and reach far beyond any treaty right of access.

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statement.

An examination of the easement analysis adopted by the lower courts reveals the degree to which the court of appeals expanded the scope of tribal rights reserved by the Treaties. In dissent, Judge Ryan acknowledged the force of the analogy made by the Municipalities below, an analogy that illustrates how occupancy rights cannot be simply an incident of access rights. As Judge Ryan paraphrased the Municipality's analogy:

> "when a landlocked estate has an implied access easement over a servient estate, that means the landlocked-estate's owners may use a road over the servient estate. And, if the road is originally dirt but is paved by the servient-estate's owner, the landlocked-estate's owner may continue using the road, in its new improved state, and is not required to pay for that improvement. But, if the servient-estate's owner builds a garage next to the road, the landlocked-estate's easement over the road does not now give rise to a right to spend the night in the garage, no matter how sympathetic the circumstances." App. at A.

This analogy describes precisely what the lower courts ruled: that the holder of an easement for access (the Tribe) now has a right to occupy property (the later-created marina facilities) adjacent to an access point (the shores of Lake Michigan). This right of occupancy represents an extreme leap of logic from an implied right of access derived from an implied right to fish.

B. The Court of Appeals' Decision Conflicts with Decisions of this Court Holding that a Court May Not Rewrite or Expand Treaties and Must Apply a Rule of Sensible Construction.

By rewriting the 1836 and 1855 Treaties to elevate a right of access to a right of occupancy, the court of appeals ignored principles articulated by this Court. As this Court held in Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943), although Indian treaties should be construed liberally, "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."[4] Id. at 432. See, also, Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985). More recently, in Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995), this Court, applying the concept that tribal rights are reserved, refused to read an Indian treaty to encompass a principle about which the parties "likely gave no thought." Id. at 466-67. Just this term, in South Dakota v. Yankton Sioux Tribe, 66 U.S.L.W. 4092 (U.S. Jan. 26, 1998), this Court limited the principle of resolving treaty ambiguities in favor of a tribe, cautioning that, when a Court is interpreting a negotiated agreement with a tribe, the Court must apply a "sensible construction" to avoid an "absurd conclusion." Id. at 4096. Taken together or individually, these decisions of this Court hold that a

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[4]In an earlier case involving the Choctaw Nation, this Court held that it is beyond the power of the judicial branch of government "to alter, amend, or add to any treaty." United States v. Choctaw Nation, 179 U.S. 494, 533 (1900).

court may not rewrite or expand treaties and must apply a rule of sensible construction.[5]

In this case, the lower courts disregarded principles articulated by this Court when creating a right of occupancy from an implied right of access derived from an implied right to fish. Not only did the courts dramatically rewrite and expand the 1836 and 1855 Treaties, but, as Judge Ryan recognized in dissent, the courts failed to apply the rule of sensible construction required by this Court's recent decision in Yankton Sioux. As Judge Ryan wrote,

> "even the solemn business of interpreting age-old Treaty obligations requires the application of some common sense. With all due respect, I fail to see the common sense in construing 1885 [sic] Indian fishing rights treaty obligations as including the right to moor commercial fishing vessels in Municipal marinas built more than 100 years later." App. at A.

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[5]The Court has recently granted certiorari in another fishing rights case to decide whether fishing and hunting rights are extinguished when tribal title to land is extinguished. State of Minnesota v Mille Lacs Band of Chippewa Indians, cert. granted, 66 U.S.L.W. 3781(U.S. June 8, 1998)(No. 97-1337). This Court's resolution of Mille Lacs may well instruct that the mooring rights found in this case, even if contemplated by the parties, were extinguished by the terms of the Treaties. Consequently, should this Court determine to refrain from granting certiorari in this case at this time, the pendency of the underlying Mille Lacs case suggests that this case should be held in abeyance.

The lower courts' dramatic expansion of the 1836 and 1855 Treaties and failure to use common sense directly contradicts this Court's rulings and should be reviewed by this Court.

C. The Importance of the Federal Question Addressed in this Case Justifies the Issuance of a Writ of Certiorari.

As Judge Ryan properly recognized, the logic and effect of the court of appeals' decision is not limited to these Municipalities, but may easily be read to provide the Tribe with the "right to moor its boats at every marina to be built hereafter at any location on the shoreline." App at A. Actually, the court's decision has a much broader impact upon private property rights.

Prior to the lower court's decision, courts interpreting the extent of tribal fishing rights had ruled that the exercise of such rights allows only minimal imposition upon private property rights. "Usufructuary rights, like hunting and fishing, imply temporary presence and minimal physical occupation of the land." Sokaogon Chippewa Community, 805 F. Supp. at 701. Usufructuary rights also do not generally involve a right to trespass on private lands. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 653 F. Supp. 1420, 1431 (W.D. Wisc. 1987). That Tribal rights may have only minimal impact on the rights of private property owners has also been recognized by this Court. In Washington v Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 684 (1979), this Court held that treaty fishers cannot rely upon access rights to destroy the rights of other citizens. By transforming an access right into a right to

occupy off-reservation property, the court of appeals' decision in this case threatens the rights of countless private property owners.[6]

The court of appeals' extension of treaty rights to include the right to occupy off-reservation, unowned real property constitutes a fundamental and unprecedented expansion of Indian treaty rights. In undertaking this expansion, however, the court failed to identify ***any*** language in the Treaties and ***any*** legal principle upon which such an expansion of the treaty right can rest. After stating that "the [Treaty] rights also included an easement of access over the lands surrounding these traditional fishing grounds, even were the land to have been privately owned," the court made the quantum leap that this "easement of access over the land" includes the right to ***occupy*** real property improvements ***adjacent*** to that easement neither owned nor constructed by the Tribe. Such a leap is based solely on the conclusion that a "contrary result [would] frustrate the purpose of the Treaties," a purpose that is unstated. App. at A. Upon such tenuous grounds, a federal court has now held for the first time that off-reservation property owners must give up occupancy of their real property and improvements to tribal members who admittedly do not own it, did not build it, and have no claim of fee ownership. Furthermore, the court of appeals' decision may very well represent the first time that a federal court has found that treaty-reserved "rights" include rights that did not exist at the time the treaty was executed. As federal

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[6]While Petitioners are municipalities, the lower courts draw no distinction between public and private property owners and their holdings apply with equal force to any private marinas where a Tribe might claim the "need" to occupy the marina in furtherance of its claimed right of access to its fishing grounds.

courts continue to define tribal rights in this and many other contexts, the court of appeals' decision creates precedent that could drastically alter treaty-interpretation jurisprudence. As such, this issue is one that should be examined by this Court.

D. The Consent Decree Does Not Provide an Alternative Basis for Granting New Rights to the Tribe.

In addition to relying on the Treaties themselves, the lower courts found that the Consent Decree granted a right to moor. As explained below, however, the Consent Decree, to which the Municipalities are not parties, does not grant the Tribe any mooring rights in the Municipalities' marinas.

The Consent Decree provides no alternative basis for granting mooring rights to the Tribe. As the district court properly recognized, any finding that the Municipalities were interfering with the Consent Decree is dependent on, *inter alia*, a finding that the enforcement of the Municipalities' commercial use restrictions against the Tribe's fishers is a violation of Treaty rights (App. at E1, "to violate the one [the Treaty right] was to violate the other [the court order]"). Similarly, the court of appeals concluded that any violation of the Consent Decree was "as a result" of the court's conclusion that "the treaty rights . . . include transient mooring." App. at A. Thus, the Municipalities could not be directed to provide mooring for Tribal commercial fishing vessels under the Consent Decree if the Tribe's fishers did not have mooring rights reserved under the Treaties. As discussed supra, however, there is no right to moor granted by the 1836 and 1855

Treaties. To the extent that the lower courts attempt to use the Consent Decree to grant tribal fishers more rights than do the Treaties, such a result impermissibly and unconstitutionally rewrite and expand those Treaties.

Any reliance on the Consent Decree as requiring the Municipalities to provide mooring for tribal commercial fishing vessels is erroneous for other reasons as well. The district court was correct that, in general, non-parties who interfere with the implementation of court orders or who interfere with the court's custody of the res in a proceeding in rem may be enjoined from continued interference. App. at E1. In this case, however, there has been no interference with either the Consent Decree or the court's possession of a res. As Judge Ryan noted:

> The GTB did not use the marinas before the incidents leading to this lawsuit . . . [and] makes no claim that the building of the marinas had any *adverse* effect on its rights. Thus, the construction of the marinas certainly did not impede access to the fishing grounds, or make access in any sense more difficult; in fact, the existence of the marinas does not interfere with the GTB's access one whit. App. at A (emphasis in original).

If anything, the free use of improved launch ramps provided the Tribe by the marinas actually enhanced the Tribe's ability to access the Great Lakes fishery. Thus, any belief that the Municipalities were frustrating the Consent Decree and any reliance upon that

decree as providing an alternative basis for granting mooring rights must fail.

II. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION TO AWARD ATTORNEY FEES CANNOT BE RECONCILED WITH THE NINTH CIRCUIT COURT OF APPEALS' SUPERIOR DOCTRINE THAT FEES MAY ONLY BE AWARDED IN CASES INVOLVING "KNOWN AND WELL-DELINEATED" TREATY RIGHTS.

A. The Court of Appeals' Decision Directly Conflicts with Ninth Circuit Decisions in *U.S. v. Washington*.

Despite the Sixth Circuit Court of Appeals' assertion that it could award fees while declining to decide whether to adopt the Ninth Circuit's "known and well-delineated rights" test, App. at A, the court's decision directly repudiates Ninth Circuit jurisprudence.

The lower courts awarded the Tribe fees under 42 U.S.C. § 1988, which provides that:

> In any action to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988.

To be entitled to fees, therefore, the Tribe must be a prevailing party in an action properly brought under 42 U.S.C. § 1983. See, Maine v. Thiboutot, 448 U.S. 1, 9 (1980); United States v. Washington, (Washington I), 813 F.2d 1020, 1022-23 (9th Cir. 1987), cert. den., 485 U.S. 1034 (1988).[7]

The issue of whether treaty rights claims may be brought under 42 U.S.C. § 1983 was thoroughly discussed in United States v. Washington, (Washington I, 813 F.2d 1020 (9th Cir. 1987); Washington II, 873 F.2d 240 (9th Cir. 1989); and Washington III, 935 F.2d 1059 (9th Cir. 1991)). The rule set forth in these decisions is that a § 1983 violation does not arise where the claim is dependent upon interpretation of a treaty. It is only when a claim is brought to enforce "known and well-delineated" treaty rights that the claim might give rise to an action under § 1983.

In Washington I, the Court of Appeals for the Ninth Circuit first faced the issue of whether 42 U.S.C. § 1988 entitled tribes to fees arising out of numerous cases that had culminated in this Court's opinion in Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979). In Washington v. Fishing Vessel Ass'n., as in the instant case, tribes brought claims for violations of treaty rights and 14th Amendment rights. Also, as in the instant case, the tribes

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[7]The Municipalities were granted summary judgment on the Tribe's equal protection claim. Accordingly, only the Tribe's due process claim is even arguably capable of supporting the fee award. That claim is dependent upon an interpretation of the scope of the Tribe's treaty rights, a finding that those rights were being violated, and a ruling that those rights support a claim under 42 U.S.C. § 1983.

prevailed on their treaty-interpretation claim, abandoned equal protection arguments after the lower court's initial decision, and failed to litigate due process claims to a favorable ruling. Washington I, 813 F.2d at 1024.

In deciding whether the tribes were entitled to fees, the Washington I court first noted that the tribes' right to fees depended upon whether the tribes had stated a claim under § 1983. Washington I, 813 F.2d at 1022-23. The court answered this question by considering the character of the principal question presented in Washington v. Fishing Vessel Ass'n and found that *certiorari* had been granted to interpret the nature and scope of treaty rights. Washington I, 813 F.2d at 1023, citing Washington v. Fishing Vessel Ass'n., 443 U.S. at 674. Examining this Court's decision, the Ninth Circuit ruled:

> It is not disputed that the Indians had rights under the treaty. Just exactly what those rights were was unknown until the Supreme Court decision. ***If the State of Washington violates these now known and well-delineated rights, there would be an actual conflict between state and federal law which might give rise to a § 1983 action.*** That, however, has not yet happened and is not the situation.
>
> We therefore hold that the Tribes' treaty interpretation claims do not give rise to a claim cognizable under § 1983. Accordingly, we conclude that such claims do not support an award

> of attorney's fees under § 1988. Id. at 1023 (citations omitted, emphasis added).

Thus, Ninth Circuit doctrine holds that fees may not be awarded in treaty cases where the court is interpreting the scope of treaty rights, but only where the court is enforcing rights that are already "known and well-delineated." See also, Washington III, 935 F.2d at 1061.[8]

As in Washington I and II, this case involves treaty interpretation and definition of the nature and scope of treaty rights, rather than an action to enforce "known and well-delineated" rights. While courts have previously ruled that the Tribe has a right to fish, the issue of whether the Tribe also enjoys a treaty-reserved right to ***moor*** commercial fishing vessels at the

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[8]In Washington II, the tribes sought attorney fees for work performed in a phase of the litigation in which the tribes were granted partial summary judgment "***establishing*** the right to have hatchery-bred fish included in their treaty-based allocation of salmon and steelhead trout, and to have such treaty fish protected from environmental degradation." Washington II, 873 F.2d at 241 (emphasis added). Phase II, like Phase I, presented treaty interpretation issues and "merely extends [the right to harvest fish] to hatchery fish;" accordingly, the Ninth Circuit again concluded that fees could not be awarded under § 1988. Id. at 242.

Municipalities' recreational marinas was never before addressed.[9]

As previously discussed, the lower courts construed the scope of the Tribe's implied right of access (flowing from its implied right to fish) and concluded that this right includes a right to moor commercial fishing vessels at the Municipalities' recreational marinas. Language used by the district court illustrates that the court was interpreting the scope of treaty rights, rather than merely enforcing "known and well-delineated" rights. For instance, the district court began its analysis by stating that the "Defendants misconstrue the ***scope*** of the right." App. at E1 (emphasis added). The court then found it necessary "to ***discern the intended scope*** of the GTB's right of access [by] consulting the treaty which reserved the right of access and prior court constructions of that treaty." Id (emphasis added). After engaging in lengthy analysis and interpretation of the Tribe's treaty-reserved rights, the district court concluded that "the GTB is entitled to summary judgment on its claim to ***establish*** its treaty-reserved right to access improvements to the marinas such as mooring slips." Id (emphasis added). Accordingly, the court "declared" that, under the Treaties of 1836 and 1855, the Tribe has a right to dock at the Municipalities' marinas. Id. As these quotations illustrate, the lower courts were not merely enforcing known and well-

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[9]As in Washington I, it is not disputed that the Tribe here had treaty rights, including a right of access. Just exactly what those rights were with respect to dockage at recently constructed recreational marinas was unknown until the District Court's decision. Compare, Washington I, 813 F.2d at 1023.

delineated rights, but, as in Washington I, were resolving a dispute over the very existence, nature, and scope of treaty rights.[10]

Rather than addressing the viability of the Tribe's claim for fees using the rubric of Washington, the Sixth Circuit purportedly "declined to decide" whether Washington should be adopted and concluded that fees could be awarded on the basis of the unaddressed due process claim. App. at B. In so doing, however, the Sixth Circuit repudiated Washington. Washington, like this case, included an unaddressed due process claim upon which the tribes attempted to base their claim for fees. After prevailing on the treaty interpretation claim in Washington, the tribes in that case proceeded in ***exactly*** the same manner in which the Tribe proceeded in this litigation; that is, those tribes abandoned equal protection arguments and failed to litigate a due process claim to a favorable ruling. Given the identical posture of the two cases, the Sixth Circuit's decision can in no way be reconciled with the Ninth Circuit decisions in Washington.[11]

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[10]Notably absent from prior decisions in United States v. Michigan are any statements regarding a right to ***moor***. Prior to the District Court's decision in this case, no court had ever determined that a right to moor was included within the scope of any treaty-based right to access. This further supports the obvious conclusion that the right to moor could not have been "known and well-delineated" at the time this case commenced.

[11]Even had the Sixth Circuit applied the Washington analysis, it would have been error for the court to conclude that a right to moor was sufficiently established to be "known and well-delineated" and support a § 1983 claim. Quite obviously, the 1836 and 1855 Treaties say nothing about mooring rights in marinas the

B. The Ninth Circuit's Approach to Fee Awards in Treaty Cases Advances Superior Public Policy and Legal Doctrine.

In rejecting Washington and holding the Municipalities liable for the Tribe's fees in this treaty-interpretation case, the lower courts set a dangerous precedent and sent a troubling signal to any municipal and state government faced with tribal claims of heretofore unknown treaty rights. Specifically, the lower courts have placed state and local governments on warning that in cases allocating or defining the limits of treaty, property and other rights as between governments, non-tribal governments may be subjected to enormous costs if they disagree with the scope of rights asserted by a tribe. It is critical to recognize that in cases such as these, the courts are not addressing a deprivation of known individual rights, but rather are engaging in an initial allocation of rights and powers between governments. To subject state and local governments to fee awards in such cases dramatically impacts the ability of these governments to protect both their own property rights and the

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existence of which was not even contemplated at the time the Treaties were signed. The Tribe's claims in this case are far more attenuated than those advanced in Washington I and II. While those Washington cases involved the character of the primary right ***expressly*** reserved in a treaty, the Treaties in this case do not expressly reserve a right to fish. See App. at D. The right to moor defined in this case is a "right" several times removed from the basic treaty; it is a right that the lower courts determined to be within the scope of an ***implied*** right of access derived from an ***implied*** right to fish. Consequently, Sixth Circuit dicta suggesting that a right to moor is "known and well-delineated" in these Treaties is clearly erroneous.

rights of non-Indian citizens. In litigation of this nature, allowing tribes to recover attorney fees for simply determining whether a type of right even exists advances poor public policy.

Not only are there strong policy reasons for preferring the Ninth Circuit approach, but the approach in Washington also stands on superior legal ground. In its initial opinion, the Sixth Circuit correctly acknowledged that Treaty rights must be recognized by state and local governments by virtue of the Supremacy Clause, U.S. Const., art. VI. cl.2. App. at D. As this Court has held, however, the Supremacy Clause is not itself a rights conferring provision and does not create rights enforceable under 42 U.S.C. § 1983. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 107 (1989). Consequently, numerous lower courts have found that claims brought based on the Supremacy Clause do not support fee awards under 42 U.S.C. § 1988. See, e.g., White Mountain Apache Tribe v. Williams, 810 F.2d 844, 852 (9th Cir. 1987); Maryland Pest Control Ass'n. v. Montgomery County, Maryland, 884 F.2d 160, 163 (4th Cir. 1989), cert. den., 494 U.S. 1056 (1990). Thus, fees under 42 U.S.C. § 1988 should not be available in cases involving treaty rights applicable to state and local governments by virtue of the Supremacy Clause, and the Washington approach should be adopted by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Table of Appendix Contents

6TH CIRCUIT FILINGS:

Opinion in Docket No. 96-1168,
filed 4/15/98 . . . . . A-1 thru A-24

Opinion in Docket No. 96-2396/96-2466,
filed 7/1/98 . . . . . B-1 thru B-20

Order Denying Petition for Rehearing,
filed 6/10/98 . . . . . C-1 thru C-2

Treaties, Statutes, and
Constitutional Provisions . . . . . D-1 thru D-46

Table of Appendix Contents, Cont.

WESTERN DISTRICT OF MICHIGAN FILINGS:

Opinion,
filed 12/19/95 . . . . . E1-1 thru E1-30
Partial Judgment,
filed 12/20/95 . . . . . E2-1 thru E2-3
Order and Judgment,
filed 1/17/96 . . . . . E3-1 thru E3-2
Opinion,
filed 7/12/96 . . . . . E4-1 thru E4-22
Partial Judgment,
filed 7/12/96 . . . . . E5-1 thru E5-2
Order and Amended Judgment
with Opinion,
filed 10/4/96 . . . . . E6-1 thru E6-14

Two excerpted pages of the
First Amended Complaint,
filed 12/27/94 . . . . . F1-1 thru F1-3
Two excerpted pages from a brief,
filed 4/17/95 . . . . . F2-1 thru F2-5
One excerpted page from a brief,
filed 4/17/95 . . . . . F3-1 thru F3-2
Two excerpted pages from
discovery materials,
filed 4/17/95 . . . . . F4-1 thru F4-3

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

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File Name: 98a0109p.06

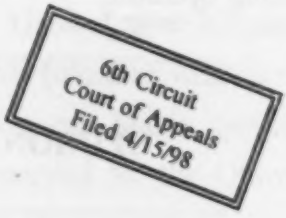
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Grand Traverse Band of
Ottawa and Chippewa
Indians,
Plaintiff-Appellee,

No. 96-1168

v.

Director, Michigan
Department of Natural
Resources,
Defendant,



Township of Leland;
Village of Northport,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 94-00707--Richard A. Enslen, Chief District Judge.

Argued: July 28, 1997

Decided and Filed: April 15, 1998

Before: JONES, NELSON, and RYAN, Circuit Judges.

COUNSEL

ARGUED: Stephen O. Schultz, FOSTER, SWIFT, COLLINS & SMITH, Lansing, Michigan, for Appellants. William Rastetter, Cedar, Michigan, for Appellee.
ON BRIEF: Stephen O. Schultz, FOSTER, SWIFT, COLLINS & SMITH, Lansing, Michigan, for Appellants. William Rastetter, Cedar, Michigan, John F. Petoskey, GRAND TRAVERSE BAND LEGAL DEPARTMENT, Suttons Bay, Michigan, for Appellee.

JONES, J., delivered the opinion of the court, in which NELSON, J., joined. RYAN, J. (pp. 15-17), delivered a separate dissenting opinion.

OPINION

NATHANIEL R. JONES, Circuit Judge. Defendants,[1] the Village of Northport and the Township of Leland

[1]The Director of the Michigan Department of Natural Resources ("MDNR") was also a named Defendant in the suit. Significantly, however, MDNR does not appeal the judgment.

("municipalities"), appeal from a partial grant of summary judgment for the Plaintiffs, the Grand Traverse Band of Ottawas and Chippewas ("GTB"). GTB sued to enforce its treaty based claim to establish transient mooring access to the Leland and Northport Marinas as well as declarative relief pursuant to a 1985 consent order. For the reasons that follow, we affirm.

I. Background

GTB is the successor in interest to the Grand Traverse Band of Ottawas and Chippewas, who along with other Native American tribes, signed two treaties with the United States in 1836 and in 1855. In these treaties, the Ottawas and Chippewas reserved the right to continue commercial and subsistence fishing in the Great Lakes Region. The tribes, however, ceded their lands (most of what is now the State of Michigan) to the United States government. Specifically, the 1836 treaty reserved for the Ottawas and Chippewas the right to fish in their usual places, which included the waters off the Leelanau Peninsula. *Treaty of Washington*, 7 Stat, 491. The 1855 treaty preserved a reservation located adjacent to these traditional fishing grounds. *Treaty of Detroit*, 11 Stat. 621. The land and water areas upon which the Leland and Northport marinas now rest, historically, were used by the Ottawas and

Chippewas to access fishing sites in Lake Michigan and Traverse Bay. [2]

The Township of Leland is located on the west side of the Leelanau Peninsula on the Grand Traverse Bay. The Leland Marina lies on that side of the Peninsula. The Leland Marina has 58 mooring slips which can hold up to 120 vessels. The Village of Northport shore is located on the eastern shore of the Leelanau Peninsula where the Northport Marina is located. Northport Marina has 100 slips, including 5 dedicated to commercial use and can accommodate up to 116 vessels. Each marina is owned and operated by the corresponding municipality.

During the 1970s, the United States instituted litigation against the State of Michigan in order to protect Native

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[2]The municipalities appear at some points to assert that their marinas are adjacent to the areas used by treaty fishers for access to their fishing grounds. However, the district court's factual conclusion that the land on which the marinas sit, historically, has been used by treaty fishers to access their traditional fishing grounds was not clearly erroneous. This conclusion is supported by ample evidence, including an affidavit by Dr. James McClurken, an ethnohistorian who specializes in Native American tribal culture and history. (J.A. at 94-101). Although the municipalities baldy assert that GTB's access to traditional fishing grounds was located adjacent to their marinas, they provide absolutely no evidence to substantiate this claim and do not directly challenge the district court's conclusion on appeal.

American fishing rights. As a result of this litigation, the district court expressly found that the 1836 and 1855 treaties gave Native American treaty fishers, including GTB, the right to fish for subsistence and commercially in the Great Lakes Region. *United States v. Michigan*, 471 F. Supp. 192, 216 (W.D. Mich. 1979), *mod. in part*, 653 F.2d 277 (6th Cir. 1981). The district court further held that this right could not be burdened or abridged by the State of Michigan. Id. at 270. On appeal, this court affirmed that the treaties gave Native Americans the right to fish the Great Lakes, a right restricted only by state conservation efforts that utilized the least restrictive means available. *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981).

After remand, the parties involved in the litigation signed a consent order which was adopted by the district court on May 31, 1985, and was to be in effect for 15 years.[3] The district court had adopted this consent order, after a hearing, in which the court explicitly found that it would be "superior to [other plans] in protecting the Indian reserved treaty fishing right." 12 ILR 3079. The consent order granted Native American fishers the exclusive right to

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[3]The Village of Leland and the Township of Northport were not named parties to this consent order, which was between the United States Government, the State of Michigan and various Native American organizations, including GTB.

commercial fishing in certain areas of Lake Michigan, and restricted their use of other areas. It divided Lake Michigan into several hundred grids or zones, reserving the three main grids surrounding the Leelanau Peninsula (where the Leland and Northport Marinas are located) for the exclusive use of GTB. These grids lie in traditional fishing waters reserved in the 1836 treaty and are numbered 615, 714, and 715 respectively. GTB was also granted exclusive fishing rights in grids 616, 715, 716, 815 and 816.

Additionally, as part of the consent order, GTB agreed to forgo all gill net fishing from small boats in specified zones in order to preserve certain species of fish that had nearly been depleted by over fishing. Thus, GTB began using large boats that cannot be "trailered."[4] The consent order also expressly required the use of impoundment gear in some areas that must also be utilized with large nontrailerable vessels. Grids 615 and 714 are both located in the rough open waters of Lake Michigan that cannot be accessed safely with small boats.

George Duhamel, a GTB member, began docking his commercial fishing vessel at the Northport and Leland Marinas in 1993. Shortly after Duhamel began docking his vessel at the marinas, he was told that he could not moor his vessel at the marinas because of agreements between the

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[4]Boats that could not be placed onto trailers pulled by a car or truck.

municipalities and the State of Michigan that limit the commercial use of the marinas.[5] When Duhamel refused to remove his vessel from the Northport slip in July of 1993, he was arrested. In 1994, Duhamel was threatened with arrest when he attempted to moor his boat at the Leland Marina. On October 17, 1994, after negations between the parties failed, GTB filed suit against MDNR challenging the commercial use prohibitions at the Northport and Leland Marinas. On December 27, 1994, GTB filed an amended complaint adding the Township of Leland and the Village of Northport as Defendants. The parties then filed cross motions for summary judgment. The district court granted partial summary judgment to GTB, finding that the Defendants could not bar GTB's right to use the marinas for commercial fishing without violating

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[5]Both municipalities have contracts with the State of Michigan limiting the commercial use of their marinas. Leland's agreement with MDNR, signed in May 1967, provides that no commercial vessels may be permitted to "regularly" use the facilities. (J.A. at 203). Northport's agreement, signed in 1988, prohibits regular commercial use absent written approval, as well as all commercial fishing vessels. (J.A. at 211).

the consent order and the 1836 and 1855 treaties.[6] This appeal followed.

II.

The municipalities raise two arguments on appeal. First the municipalities argue that the district court erred in granting summary judgment on GTB's treaty based claim of mooring access to their marinas. Second, the municipalities argue that the district court erred by granting summary judgment pursuant to the 1985 consent order in which the municipalities were not parties. We review a district court's grant of summary judgment *de novo, Russo v. City of Cincinnati*, 953 F.2d 1036, 1041-1042 (6th Cir. 1992), and findings of fact for clear error. *Eastern Kentucky Resources v. The Fiscal Court of Magoffin County*, 1997 WL 631261 at *7 (6th Cir. 1997). We will discuss each issue in turn.

A. Treaty Rights

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[6]GTB also claimed relief pursuant to 18 U.S.C. § 1983, alleging that the municipalities violated its fishers' constitutional right to equal protection of the laws. The district court granted summary judgment to MDNR and the municipalities on this claim, and GTB does not appeal that judgment.

It is undisputed that the rights retained by GTB in the treaties of 1836 and 1855 included access to its traditional fishing grounds located within the areas of the Leland and Northport marinas. The parties to this dispute, however, question the scope of that right. The municipalities assert that GTB's right to fish does not include a right to occupy the marinas and at most GTB possesses an easement of access over the municipalities' marinas. This right, they argue, is limited to the right of ingress and egress only, and not to a limited use of improvements such as mooring slips.[7] We disagree.

On the outset, we note that it is well settled that Native American treaties must be liberally construed in favor of Native Americans. *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1970); *Antoine v. Washington*, 420 U.S. 194 (1975); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). The rights granted by the treaties at issue here clearly included the right to fish the waters of the

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[7]The municipalities also devote a large amount of their brief to legal arguments that an easement holder cannot utilize improvements located *adjacent* to an easement. Those legal arguments are completely irrelevant to the present appeal, however, because as noted in footnote 4 supra, the district court's conclusion that the areas on which the marinas now sit was utilized by GTB, is not clearly erroneous.

Great Lakes region for both subsistence and commercial fishing.[8] The rights also included an easement of access over the land surrounding these traditional fishing grounds, even were the land to have been privately owned. *See United States v. Winans*, 198 U.S. 371, 381, 384 (1905) (noting that treaty rights "impose[] a servitude upon every piece of land as though described [in the treaty]...and fixes in the land such easements as enables the right to be exercised."); *see also Seufert Bros. Co. v. United States*, 249 U.S. 194, 198-99 (1919). This easement, implied by reservation or necessity, reserved the access necessary to allow the treaty fishers to fish from their traditional fishing areas.[9] *See Winans*, 198 U.S. at 384; *United States v. Michigan*, 471 F. Supp. at 238. As noted, the marinas

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[8]The district court in the *Michigan* litigation, provided a detailed history of the Chippewas' and Ottawas' dependence on fish for both subsistence and commercial resources. *United States v. Michigan*, 471 F. Supp. at 221-225. This dependence stretched back as far as 10,000 B.C. *Id.* at 214.

[9]Although a *profit a pendre* is more likely the technical term for GTB's interest because they have a right to take fish from the waters, *see, e.g., Mille Locs Band of Chippewas v. Minnesota*, 952 F. Supp. 1362, 1376 (D. Minn. 1997), *aff'd* 124 F.3d 904 (8th Cir. 1997) (defining *profit a pendre*), the distinction is not determinative for purposes of this appeal and we find easement law instructive.

owned by the municipalities fall squarely within the location of this easement. In addition, the treaties did not in any way, limit the means by which fish were to be taken from the lakes or restrict the treaty fishers to using technology that was in existence at the time of the treaty. *See United States v. Michigan*, 471 F. Supp. at 260 ("The right [to fish] may be exercised utilizing improvements in fishing techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.").

In order to continue commercial fishing, however, GTB must utilize large boats that cannot be trailered. Thus, we find that two basic principles mandate that the right of access to GTB's traditional fishing grounds includes the right of transient anchoring of commercial vessels at the municipalities' marinas. First, courts are bound to construe treaties, not only liberally in favor of Native Americans, but in a way to "reserve to the Tribes all rights necessary to effectuate the purpose of the Treaty." *Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983) (citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968); *Winters v. United States*, 207 U.S. 564, 575-77 (1908)); *see also Winans*, 198 U.S. at 380-381 (securing access to fishing grounds over private property because "[n]o other conclusion would give effect to the treaty.").

In the present case, the scope of the treaty right of access to traditional fishing grounds includes transient mooring on the public property of the municipalities, because not only would a contrary result frustrate the purpose of the treaties, such a result would simply destroy all rights to commercially fish that were conveyed by them. The district court correctly concluded that "[t]here simply is no material dispute of fact that GTB fishers reasonably require the ability to occasionally moor their vessels at Northport and Leland in order to: access traditional areas in grids 714 and 615, fish with impoundment gear and, fish for chubs, unload nets, off-load fish and seek shelter during emergencies." *GTB v. Michigan Dep't of Natural Resources*, 971 F. Supp. 282, 291 (W.D. Mich. 1995). Undeniably, it is not safe to fish in the open waters of grids 714 and 615 in small trailerable boats as testified by John Robertson, Chief of the Fisheries Division of MDNR. These grids require large boats that cannot be trailered in and out of a marina on a daily basis. Moreover, the consent order expressly requires equipment that cannot be trailered on a daily basis. There are no harbors near GTB's fishing areas that would allow GTB to fish with the boats that they must now utilize.[10] Further, even MDNR has recognized the necessity behind GTB's request for access to the mooring

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[10]The next nearest marina would require round trips of between five and ten hours.

slips. Indeed, MDNR has not appealed the judgment, and has previously indicated a willingness to relieve the municipalities of any alleged obligation to prohibit GTB's requested access. (J.A. at 323).[11]

The municipalities do assert that according to "simple logic" the fishing grounds that are now not safely accessed through small boats, were not fishing grounds that were fished at the time of the treaties. This "simple logic," however, is refuted by direct evidence submitted by GTB in the form of affidavits by no fewer than four individuals who all testify to the contrary. Additionally, the fishing grounds reserved by the treaty fishers in the treaties was not limited any specific way. *See United States v. Michigan*, 471 F. Supp. at 231 ("This area include[d] the waters of the Great Lakes...."). Thus, we find that the district court's conclusion in that regard was not clearly erroneous.

Secondly, contrary to the municipalities' position, we find that traditional property law concepts do not prohibit the use of improvements on an easement when necessary for effectuation of the easement's purpose. *Cf. United States v.*

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[11]MDNR has explicitly stated that their agreements with the municipalities do not preclude the municipalities from providing mooring slips to GTB, has indicated that the access requested was reasonable under the specific facts, and has noted that the access was necessary to give effect to the 1985 consent order. (J.A. at 173, 313, 323)

Hughes, 408 F.2d 619, 621 (6th Cir. 1969) ("[T]he owner of the dominant easement has all the rights incident or necessary to proper enjoyment of the easement.") (citing 25 Am. Jur. 2d Easements & Licenses §§ 72-75). References to cases such as *Delaney v. Pond*, 86 N.W.2d 816 (Mich. 1957), upon which the municipalities base their contentions, are thus easily distinguishable. *See also, Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868 (Tex. Ct. App. 1988); *Douglas v. Bergland*, 185 N.W. 819 (Mich. 1921). In *Delaney*, for example, the court did restrict an easement of access to a river merely to ingress and egress, and prohibited the dominant estate holder from sun bathing and permanently mooring its boats on the plaintiffs' property. *Delaney*, 86 N.W.2d at 817. The court found that because the easement was an express easement which specifically stated that it was an easement for a right of way, the easement was limited to ingress and egress only. *Id.* The court, however, noted that "[t]he right granted to plaintiffs to make use of the water granted to plaintiffs no rights to the bordering land *beyond that necessary to permit enjoyment of the water rights*." *Id.* (emphasis added). The court also noted that the "use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Id.; see also Lakeside*, 750 S.W.2d at 871 (noting that the scope of an easement is rendered "to the extent reasonably necessary to afford ingress and egress to the owner of the dominant estate and

no more."). Because there was no showing in *Delaney* of the necessity of sun bathing on the plaintiff's property or of a *permanent* mooring of the defendant's boats, the court strictly construed the express easement as one for only egress and ingress. *Delaney*, 86 N.W.2d at 817. Here, to the contrary, GTB is forced to utilize boats that cannot be trailered, and will not be afforded ingress and egress, or any access by commercial boats to their fishing grounds, without use of the marinas. Thus, the scope of the easement must include mooring access to the marinas in order to permit use and enjoyment of the easement. Otherwise, an easement of access over the land where the marinas are situated, would be meaningless. Moreover, there was no express easement in this case that was limited to its specific terms, but rather an easement by reservation or necessity the purpose of which was *access* to fishing grounds. Furthermore, the marinas are clearly equipped for the commercial uses envisioned by GTB, which uses will not materially increase the burdens on the marinas. *Cf. Delaney*, 86 N.W.2d at 817 ("A principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate....") (citing Am.Jur., Easements § 115).

Finally, we find other arguments made by the municipalities in order to justify their restriction of GTB's use of the marinas unavailing. As noted, the municipalities

contend that agreements with the MDNR mandate that commercial vessels are not permitted at their marinas. This is incorrect for two reasons. First, under the Supremacy Clause of the United States Constitution, treaties override any conflicting state or local laws. U.S. Const., art. VI. Cl. 2; *accord United States v. Michigan*, 471 F. Supp. at 281. Second, as noted, MDNR clearly indicates that it believes that GTB is entitled to access to the marinas and that the agreements provide no interference with that right. *See* note 10, *supra*. Moreover, we note that Northport has already granted a commercial vessel much larger than those owned by GTB permission to use its marina regularly. Thus, the agreements do not provide an obstacle to GTB's use, and the municipalities have not indicated how GTB would interfere with the use of this property that is already opened for use by the public at large. Significantly, GTB does not request any more mooring rights than those that the marinas already allow. Thus, there are simply no reasons why such use would be prohibited. Accordingly, we hold that the 1836 and 1855 treaties provided for an easement of access to reach traditional fishing grounds which includes the right of transient mooring in the municipalities' marinas.

B. Consent Order

The municipalities assert that the district court incorrectly granted declarative relief pursuant to the 1985 consent

order, because the municipalities were not parties to that order. Thus, the municipalities assert that the district court erred by granting partial summary judgment in favor of GTB restricting any interference with the consent order. We do not agree.

A district court has the jurisdiction to enforce consent decrees. *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994) (citing *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)). Such decrees are settlement agreements "subject to continued judicial policing." *Id.* at 1017. In addition, a consent decree must be construed "to preserve the position for which the parties bargained." *Id.* at 1018.

The consent order at issue in this case expressly provided GTB the right to fish in its traditional fishing grounds. This order was litigated and found sufficient to "protect[] the Indian reserved treaty fishing right" 12 ILR 3079, established by the 1836 and 1855 treaties, and affirmed by the *Michigan* litigation. *See United States v. Michigan*, 471 F. Supp. 192. The treaty rights, as discussed, include transient mooring access to the marinas. As a result, and in furtherance of the consent order, then, GTB is permitted to moor its vessels at the marinas. To do otherwise would interfere with the express purpose of the consent order.

Although the municipalities were not named parties to the order, it is well settled that third parties who interfere with a court order may be enjoined from doing so. *See*

Washington State Commercial Passenger Fishing Vessel, 443 U.S. at 693 n.32. In *Washington State Commercial Passenger Fishing Vessel*, the Supreme Court found that commercial fishing associations who were interfering with the district court's order pursuant to a Native American treaty, could be bound by the order, although they were not parties to the proceeding that led to the issuance of the order. *Id.* The Court found in the alterative, that the fishing association's members, as citizens of the State of Washington which was a party to the prior proceedings, could be bound on that basis as well. *Id.* We find *Washington State Commercial Passenger Fishing Vessel* controlling. Here too, third parties are attempting to interfere with a prior court order mandating that Native American treaty fishers be permitted to fish in their traditional grounds. Additionally, the alternative basis provided in *Washington State Commercial Passenger Fishing Vessel* is applicable because the Village of Northport and the Township of Leland are instrumentalities of the state. MDNR, is also an instrumentality of the state, and thus any agreements made by MDNR conflicting with the consent order would also be void abinito with respect to GTB.

Furthermore, we find the Second Circuit's position in *Association for Retarded Citizens of Connecticut v. Thorne*, 30 F.3d 367 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079

(1995), distinguishable.[12] In *Thorne*, the Second Circuit ruled that the district court had improperly joined a third party as a defendant in the litigation and had improperly issued a preliminary injunction against the third party requiring it to abide by the terms of a previously entered final order. *Id.* at 368. The court noted that the All Writs Act, used as a basis for the district court's decision, did not grant a district court the authority to enforce a decree against a nonparty to a privately negotiated settlement agreement. *Id.* at 370. The court contrasted an instance "[w]here the district court exercises its jurisdiction to rule on the merits of a litigation...determines that the law requires a certain outcome and is empowered to issue remedial orders to effectuate that outcome," with a privately negotiated consent decree that does not determine the rights and obligations of the parties as required by law. *Id.* In the latter case, the district court found that the All Writs Act does not empower a district court to enforce the privately negotiated decree against those not parties to it. *Id.* In the present case, to the contrary, the consent order was adopted pursuant to litigation which determined that the

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[12]Moreover, the district court, although citing the All Writs Act as permitting the court to fashion orders against third parties who frustrate the implementation of a court order, *see* 28 U.S.C. § 1651, expressly declined to issue an injunction pursuant to the Act, noting that declaratory relief would permit access issues to resolve themselves.

law expressly required that GTB be permitted to fish the Great Lake region as provided by treaty. Therefore, the Second Circuit's decision is distinguishable here.

III.

In sum, the treaties of 1836 and 1855 grant GTB access to moor their commercial vessels on the municipalities' marinas. The municipalities may not interfere with this access without violating the treaties and the 1985 consent order. We note that this decision grants only a transient right to moor on an occasional basis in common with the recreational public who also utilize the facilities. Accordingly, the district court's judgment granting partial summary judgment to GTB is **AFFIRMED**.

DISSENT

RYAN, Circuit Judge, dissenting. In my judgment, the Grand Traverse Band of Ottawa & Chippewa Indians is not entitled to moor its fishing vessels at the marinas at Leland or Northport either by virtue of the Treaties of 1836 and 1855, or by virtue of the consent judgment between the tribe and the State of Michigan. Therefore, I respectfully dissent.

The GTB's brief repeatedly makes the following statement: "In order to have access to the fishing opportunities" to which they are undeniably entitled, the "GTB must be able to utilize mooring slips *at the Leland and Northport marinas*, because no other access exists . . . ." (Emphasis added.) If this proposition is an abbreviated syllogism, it is an invalid one: the term "access" simply does not denote "mooring." I do not dispute that in order to carry on its commercial fishing business, the GTB must use vessels that cannot be trailered; nor do I dispute that in order to use these vessels, the operators must be able to moor them occasionally at a marina. But, rather plainly, it does not follow that the tribe's need for marina facilities creates a right to use *Leland's or Northport's* marinas.

Perhaps the State of Michigan is obligated to build the GTB a marina; perhaps the GTB must build its own marina; I offer no opinion about these matters. But certainly the GTB's need of a marina does not give rise to an obligation on the part of Leland or Northport to *provide* one.

Even the solemn business of interpreting age-old treaty obligations requires the application of some common sense. With all due respect, I fail to see the common sense in construing 1885 Indian fishing rights treaty obligations as including the right to moor commercial fishing vessels in municipal marinas built more than a hundred years later.

The GTB did not use the marinas before the incidents leading to this lawsuit. While the tribe suggests that its enjoyment of its fishing rights was imperfect during this period because it could not dock its boats anywhere, it makes no claim that the building of the marinas had any *adverse* effect on its rights. Thus, the construction of the marinas certainly did not impede access to the fishing grounds, or make access in any sense more difficult; in fact, the existence of the marinas does not interfere with the GTB's access one whit. Likewise, the GTB does not claim it was entitled, either as an incident of its treaty rights or as an incident of the consent order between it and the State of Michigan, to have Leland, Northport, or anyone else build marinas for its use. The GTB's argument is simply that now that the marinas *do* exist, it must be permitted to moor there because mooring is an incident of its right of access

to the fishing grounds. Presumably, since the GTB has a right of access to the waters of Lake Michigan over virtually all of the shoreline ("every piece of land") of the Leelanau Peninsula, the tribe has a corresponding treaty right to moor its boats at every marina to be built hereafter at any location on the shoreline. But that, of course, is absurd.

To me, the fact that using the Leland and Northport marinas would make the GTB's indisputable right of access to Lake Michigan more convenient proves nothing. The municipalities make a persuasive analogy: When a landlocked estate has an implied access easement over a servient estate, that means the landlocked-estate's owners may use a road over the servient estate. And if the road is originally dirt but is paved by the servient-estate's owner, the landlocked-estate's owner may continue using the road, in its new improved state, and is not required to pay for that improvement. But if the servient-estate's owner builds a garage next to the road, the landlocked-estate's easement over the road does not now give rise to a right to spend the night in the garage, no matter how sympathetic the circumstances. Even if the landlocked-estate's owner has been ordered by a court in an unrelated matter not to use a car, and therefore has to walk down the road, and the road is long, and he occasionally gets very tired or caught in a rainstorm while walking down the road, he still is not entitled to take shelter in the garage.

At bottom, my objection is simple. The building of these marinas did not change anything about the GTB's access rights; the marinas neither increased nor decreased the GTB's ability to access the fishing grounds in question. The responsibility for an absence of modern, efficient, and meaningful "access" cannot be laid at the door of Leland and Northport, and therefore, they are not required to ameliorate the problem by allowing commercial fishing vessels to moor at the marinas they built for the exclusive use of recreational vessels.

I would reverse.

NOT RECOMMENDED FOR PUBLICATION

Nos. 96-2396/96-2466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Grand Traverse Band of Ottawa and Chippewa Indians, Plaintiff-Appellee, Cross-Appellant,	*	On appeal from the United States District Court for the Western District of Michigan
v.	*	
Director, Michigan Department of Natural Resources; Township of Leland; Village of Northport, Defendants-Appellants Cross-Appellees,	*	

6th Circuit
Court of Appeals
Filed 7/1/98

BEFORE: JONES, NELSON and **RYAN**, Circuit Judges.

NATHANIEL R. JONES, Circuit Judge. This is an appeal and cross-appeal of an award of attorney's fees under 42 U.S.C. § 1988. The full facts of the underlying litigation in this appeal are set out in this court's opinion in

Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources, et. al, No. 96-1168, 1998 WL 171331 (6th Cir. April 15, 1998). For the purpose of the attorney's fees issue we briefly summarize the pertinent facts.

I.

The Grand Traverse Band of Ottawas and Chippewas ("GTB") sued the Village of Northport, the Township of Leland and the Director, Michigan Department of Natural Resources ("MDNR") challenging commercial use prohibitions contained in agreements between MDNR and the municipalities that prevented GTB tribal fishers from mooring their commercial fishing vessels at the municipalities' marinas. GTB charged that enforcement of the commercial use restrictions against them deprived its members of the right to fish guaranteed by treaties with the United States in 1836 and 1855, as well as a 1985 consent judgment entered into with the State of Michigan. These documents, GTB asserted, entitled its members to fish certain traditional fishing grounds located in the Great Lakes areas, and to enjoy a right of access to these areas that included mooring access to the municipalities' marinas. GTB also asserted two claims under 42 U.S.C. § 1983, that the enforcement of the commercial use prohibitions violated its rights of due process and equal protection of the laws.

On December 19, 1995, the district court granted summary judgment to GTB on its treaty-based and consent judgment claims to establish mooring access to the municipalities' marinas. The district court granted summary judgment to the municipalities, however, on GTB's equal protection claim, and in a footnote of the opinion declined to rule on the due process claim finding that the claim needed further briefing. J.A. at 530 n.1. Subsequently, in a letter to the district court on December 29, 1995, GTB voluntarily dismissed the due process claim "in the spirit of comity" because the grant of partial summary judgement in its favor provided GTB with sufficient relief. J.A. at 548. This court affirmed the district court's decision granting transient mooring access to GTB on appeal.

GTB then sought attorney's fees from both Northport and Leland.[1] On August 19, 1996, GTB filed an amended bill of costs for attorney's fees and expenses under 42 U.S.C. § 1988 for the following: 1) approximately 552.59 hours of billed attorney's fees in the primary litigation, at $175.00 an hour totaling $96,703.25; 2) 335.43 hours of billed attorney's fees in ancillary federal and state

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[1]GTB did not seek fees against MDNR. After the filing of time lawsuit, MDNR supported GTB's request for mooring access and submitted a memorandum to the district court in GTB's favor.

court proceedings[2] concerning: a) the arrest of a GTB member for mooring at the Northport Marina, and b) access to the Northport marina, at $175.00 an hour totaling $58,700.25; 3) expenses in the primary proceeding of $1,815.06; and 4) expenses in the ancillary state and federal court proceedings of $617.76. J.A. at 845-46.

In three separate opinions, the district court granted GTB fees and held the municipalities jointly and severally liable for the entire amount of $98,518.31 (fees plus expenses) for the primary litigation. The district court

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[2]We refer to three separate proceedings as the "ancillary proceedings" for which GTB seeks attorney's fees. The proceedings arose after a GTB tribal fishermen, George Duhamel, was arrested and prosecuted for criminal trespass when he docked his commercial fishing vessel at the Northport Marina. In response, GTB sought declaratory and injunctive relief in federal court in *United States v. Michigan*, No. 2 73 CV 26, the first of the three separate proceedings, and a case over which the district court had continuing jurisdiction under the terms of the 1985 consent order. Apparently, the resolution of this case rendered that suit superfluous and that action was dismissed as moot. In the second proceeding, Northport commenced civil proceedings in state court against Duhamel seeking an injunction prohibiting Duhamel from mooring his vessel at its marina. GTB defended Duhamel in this state court civil action and also in the state court criminal proceeding concerning the trespass charge. GTB sought attorney's fees for all three of these proceedings, however, only against Northport.

determined that although it had declined to address GTB's § 1983 due process claim in its initial determination of summary judgement, the claim arose out of time same nucleus of facts as time treaty-based claims and as a prevailing party in the primary litigation GTB was entitled to a fee award. The district court, however, declined to award fees in the ancillary federal and state court proceedings, noting that the municipalities were not even parties to the federal proceedings and that the fees in the state proceedings did not specifically concern GTB, but one of its members.[3] The municipalities appeal time district court's award of attorney's fees in the primary litigation and GTB cross—appeals the denial of fees in the ancillary proceedings.

II.

We review a district court's grant of attorney's fees for an abuse of discretion, giving the district court's award of fees "substantial deference." *Hadix v. Johnson,* 65 F.3d 532, 534 (6th Cir. 1995) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983)). In so doing, we apply a clearly erroneous standard in determining whether the prevailing

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[3]In one opinion concerning attorney's fees, the district court initially found that GTB might be entitled to fees for the ancillary proceedings, but after further briefings by the parties declined to award fees.

party has in fact worked the hours claimed; we determine whether the court erred "when reviewing legal questions concerning the relationship of the hours billed to the points on which the party prevailed"; and "we look to see whether the district court has misapplied the reasonable practices of the profession when determining whether a party used poor judgment in billing the opposing party for hours spent on the case." *Wooldrige v. Marlene Industries Corp.*, 898 F.2d 1169, 1175 (6th Cir. 1990).

While each party to a lawsuit ordinarily bears his or her attorney's fees and costs, 42 U.S.C. § 1988 authorizes an award of reasonable attorney's fees to prevailing parties in civil rights litigation. *Hensley,* 461 U.S. at 429. Under that section, which provides that "[i]n any action or proceeding § 1988 because it is not an action to enforce § 1983. Treaty interpretation claims, the municipalities argue, do not support claims under § 1983.

In the *Washington* litigation, relied upon by the municipalities, the Ninth Circuit discussed the issue of attorney's fees in Native American treaty cases. *See United States v. Washington,* 935 F.2d 1059 (9th Cir. 1991) *(Washington IV); United States v. Washington,* 873 F.2d 240 (9th Cir. 1989) *("Washington III"); United States v. Washington,* 813 F.2d 1020 (9th Cir. 1987) *("Washington II'); United Slates v. Washington,* 774 F.2d 1470 (9th Cir. 1985) *("Washington I").* In *Washington II,* the Ninth Circuit found that treaty interpretation claims do not give

rise to claims cognizable under § 1983 unless those claims involve "known and well—delineated rights." *Washington II,* 813 F.2d at 1023. The court noted that throughout the prior litigation in the case concerning the Native American's right to fish under several treaties, there was no discussion of the state's violation of the Native Americans' rights under the treaties or the Fourteenth Amendment, because those rights were unknown until after a Supreme Court decision defining those rights. *Id.* The court found, however, that if the State of Washington presently had violated the rights delineated by the Supreme Court in the earlier litigation, there would be an actual conflict between state and federal law which might give rise to a § 1983 action. *Id.* Because the treaty interpretation claims did not involve known and well delineated rights, the court found that they could not give rise to a § 1983 claim and accordingly could not serve as a basis for awarding attorney's fees. *Id.*

The court also rejected a second alternative basis for § 1988 attorney's fees, that there was a pendent Fourteenth Amendment claim pleaded in the original complaint, finding that any such claims "lurking about were so attenuated and unsubstantial as to be absolutely devoid of merit." *Id.* (citations and quotation marks omitted). In *Washington III,* the Ninth Circuit again reversed an award of attorney's fees in Phase II of the litigation, finding that the judgment in the case resulted from treaty interpretation and was not based

on a violation of rights under the treaty, and as such could not be a basis for an award attorney's fees. *Washington III*, 873 F.2d at 242. In *Washington IV*, however, the Ninth Circuit reversed the district court's decision denying a request for fees in the case. The court held that fees were proper in that aspect of the litigation because it was a subproceededing to enforce the Native Americans' rights to take certain fish. *Washington IV*, 935 F.2d at 1061. The court found that previous litigation had attempted to define the treaty rights, but that the subproceeding involved in its case was purely an action to enforce them. *Id.* The court noted that the district court had not been required, as in prior litigation, to interpret the treaties on define the rights conferred, but instead to enforce well-defined rights recognized by both parties. *Id.* Accordingly, the court found that attorney's fees could be awarded on that claim. *Id.*

We decline, however, to decide whether this circuit will adopt the Ninth Circuit's "known and well—delineated rights" test for determining whether treaty claims may properly serve as a basis for awarding attorney's fees under § 1988.[4] Rather, we rely on the basis used to award fees

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[4]We do note, nonetheless, that GTB does have a strong argument that their case, unlike *Washington II* and *Washington III* was a claim to enforce their well-delineated rights. Unlike those cases, GTB did specifically allege that the defendants were violating the treaties, and their right to

by the district court in this case, that the unaddressed § 1983 claim brought in the suit may serve as a basis for awarding fees.[5]

It is well settled that if a party prevails on a non-fee generating claim that is pendent to a fee-generating § 1983 claim, fees may be awarded for the entire action if the non-fee—generating claim is "substantial" and both claims arose out of a common nucleus of operative fact. See *Maher v. Gagne*, 448 U.S. 122, 132-33 n.15 (1980) ('The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the [other] claim on which the plaintiff prevailed in one for which fees cannot be awarded.... [I]f the claim for which fees may be awarded meets the 'substantiality test.... attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so

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fish and for access to their fishing grounds had been well established since the litigation in *United Slates v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979), *modified in part*, 653 F.2d 277 (6th cir. 1981) and the subsequent consent judgment in that case.

[5]The district court acknowledged that GTB's alternative basis for seeking attorney's fees was that time treaty claim itself could have been expressed as a § 1983 claim, but found that no purpose would be served by ruling on that basis. J.A. at 58.

long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'") (citations omitted); *see also Seaway Drive-In, Inc. v. Township of Clay*, 791 F.2d 417, 451—52 (6th Cir. 1986), *Carreras, v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985); *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982); *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978); *Seals v. Quarterly County Court of Madison County, Tennessee*, 562 F.2d 390, 393-94 (6th Cir. 1977).

The test for substantiality is quite liberal and does not even require that the claim be supported by the evidence. *Seaway*, 791 F.2d at 452—53. Indeed, "a claim is insubstantial [only] if it is 'obviously without merit' or if 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy....'" *Id.* at 452 (citation omitted). Thus, "[t]he claim must be 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy....'" *Id.* (citation omitted).

We find, as did the district court, that the unaddressed § 1983 due process claim was substantial.[6]

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[6]We do not rely on GTB's § 1983 equal protection claim as a basis for an award of fees because the district

GTB argued that the municipalities deprived GTB and its tribally licensed fishers of their treaty reserved property rights in the fisheries' resources, and deprived its members of entitlement to a protected liberty interest when they were jailed for mooring at the marinas and prevented from pursuing their occupations. The district court upon initial review declined to grant summary judgment and dismiss the claim on the merits although it could have done so, finding that the resolution of the claim was not clear, and it needed further briefing. The district court then determined with regard to the issue of attorney's fees, that the claim was substantial-to the extent it claimed deprivation of procedural due process by the municipal defendants. Upon review we agree. Although there is dearly insufficient evidence to support a judgment on the claim, it is not so wholly without merit as to be insubstantial and completely implausible. The district court in granting summary judgment on the treaty-based claim noted that GTB's fishers were being unreasonably deprived of their ability to commercially harvest fish from traditional fishing areas by the denial of mooring at the marinas, an interest which may serve as a basis for constitutional relief. *Cf. Wilkerson v. Johnson*,

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court granted summary judgment to the municipalities on that claim, and accordingly it should not be used as a basis for fees. *See McDonald v. Doe*, 748 F.2d 1055, 1057 (5th Cir. 1984) (finding that an award of attorney's fees could not be based on a failed civil rights claim).

699 F.2d 325, 328 (6th Cir. 1983) (finding that plaintiff was unconstitutionally deprived of liberty interest when prevented from pursuing business); *cf. also Greene v. McElroy*, 360 U.S. 474, 492 (1959) (noting that the right to employment and to follow a chosen profession free from unreasonable governmental interference were liberty and property rights protected by the Constitution); *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 238 (1957) (same).

We also conclude that the district court correctly determined that the claim was reasonably related and based on a common core of operative facts as the treaty-based claims. Essentially, all of the claims advanced by GTB were based on the fact that the municipalities refused to allow GTB to moor its commercial fishing vessels at the marinas, and simply were alternative arguments for challenging the commercial use restrictions. Thus, the district court did not err by finding that GTB may be awarded attorney's fees for this case.

III. Reasonable Fees

The municipalities contend that even if GTB was properly found to be entitled to fees, the amount of the fees was not reasonable. The municipalities challenge both the $175 per hour rate of GTB's attorney William Rastetter, and the number of hours charged by him. The municipalities further contend that the district court should have reduced the fee award to take into account the

"limited" success of GTB and should have apportioned fees against the state defendant, MDNR.

A. Hourly Rate

When considering a petition for attorney's fees the starting point is the lodestar calculation, which is calculated by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *Wayne v. Village of Sebring,* 36 F.3d 517, 531 (6th Cir. 1994) (citing *Hensley,* 461 U.S. at 433). The district court has broad discretion to determine a reasonable hourly rate. *Id* at 533. A reasonable rate should be based on prevailing market rates in the community for the services rendered by similar attorneys of comparable skill, experience and reputation. *Hadix,* 65 F.3d at 536 (citation omitted). The district court determined that GTB's request for attorney's fees at a rate of $175 per hour was reasonable and we agree. William Rastetter, the attorney who represented GTB, has been practicing law for more than 25 years, has represented GTB for several years in this litigation, and has special expertise in federal and Indian law. The district court, which is very familiar with this litigation, having continuing supervisory authority over the 1985 consent judgment regarding GTB's right to fish, recognized the specialized practice in federal and Indian law that this work required, and noted that the defendants themselves had initially conceded that the $175 per hour rate sought by GTB was reasonable. J.A. at 44-

45. GTB also submitted several affidavits from attorneys in the Traverse City area providing that the rate for attorneys with special expertise was $175 per hour or more. J.A. at 645, 650, 654. Thus, we find that the district court did not abuse its discretion in determining that a rate of $175 was reasonable based on the experience and expertise of GTB's attorney and the prevailing market rate in the community.

B. Hours Expended

The next issue is whether the amount of hours charge by GTB's counsel were reasonable. In determining whether the hours requested are reasonable, this court uses a three-tiered approach. The first step is to review the district court's determination that the party has actually worked the hours set forth in the bill of costs for clear error. *Wooldrige,* 898 F.2d at 1176. We then determine whether the district court erred in determining legal questions concerning the relationship between the hours billed and the point on which the party prevailed. *Id.* Finally, we determine whether the district court misapplied reasonable practices of the profession when billed the opposing party for the hours spent. *Id.* The municipalities argue that GTB's attorney listed various task performed each day, but offered only a total number of hours worked per day without separating hours by subject matter or task, which they argue made it impossible to estimate the amount

of time spent on any individual tasks and to determine whether that time was reasonable. They also argue that fee entries were excessive, redundant or otherwise unnecessary.

We reemphasize that it is the district court, with its "superior understanding of the litigation," that is best suited for determination of the reasonableness of the fees. *Hensley,* 461 U.S. at 437. Additionally, GTB's counsel, is of course "not required to record in great detail how each minute of his time was expended....[It is enough that counsel]...identify the general subject matter of his time expenditures." *Id.* at 437 n. 12. GTB's attorney requested fees for time involving this litigation encompassing more than two years, documenting each activity expended in the litigation. J.A. at 587-617, 704-07. The district court provided a concise and clear explanation as to why it felt that the hours requested were reasonable, noting that the extensive legal briefings filed in the case illustrated the complex issues involved and supported the amount of time billed by GTB's attorney. It concluded that the total hours of 552.59, for more than two years worth of work, was reasonable given the large demands of the litigation. J.A. at 46. While GTB's attorney did not specify in minute detail the amounts of time each separate activity required, it is apparent that the district court did not clearly err by finding that GTB's counsel in fact performed the services listed on his billing statements on a given day and for the number of hours provided. Moreover, the municipalities

make only generalized objections to the number of hours on appeal, and only directly challenge work done with respect to the ancillary proceedings (work which the district court declined to award fees for).

C. Reduction for "Limited" Success

The municipalities argue that the fee award should be reduced based on the "limited" success of GTB, because it was granted transient mooring access as opposed to a permanent right to moor at their marinas. This argument is wholly without merit and borders on the frivolous. GTB never requested a right of permanent mooring, but simply that the commercial use restrictions be declared unenforceable against it. J.A. at 24. This relief is precisely what the district court ordered. The fact that the district court granted a transient right to access the marinas, in common with the recreational public, does not in any way obviate the degree of success obtained by GTB. In fact, GTB "has obtained excellent results....[and its] attorney should recover a fully compensatory fee...encompass[ing] all hours reasonably expended on the litigation...." *Hensley,* 461 U.S. at 435.

D. Apportionment

Finally, the municipalities argue that the district court should have apportioned fees against defendant MDNR. They maintain that MDNR is the more culpable

defendant because the agreements restricting the commercial use of their marinas were drafted by MDNR, and GTB initially filed suit only against MDNR and later joined the municipalities as defendants.

GTB, however, did not request fees from MDNR because MDNR assisted GTB in its assertion of a right to moor at the marinas. The Joint Status Report filed February 5, 1995, observed: "the [MDNR] has indicated a willingness to relieve the municipal government defendants of the contractual obligation prohibiting commercial use if requested to do so by these defendants." J.A. at 82. In addition, MDNR filed a memorandum supporting GTB's motion for summary judgment. *Id.* at 405—16. Specifically, MDNR argued that GTB's use of the mooring slips did not violate the commercial use contained in the agreements; maintained that the municipalities had obstructed the 1985 consent order: and requested that the district court enter an order requiring the municipalities to permit GTB to moor. It is within the district court's discretion to apportion fee among defendants. *Anderson v. Flexel Inc.*, 47 F.3d 243, 251 (7th Cir. 1995); *Koster v. Perales*, 903 F.2d 131, 139 (2d Cir. 1990). The court may consider the relative culpability of the parties against whom fees are awarded and the proportion of time spent litigating against each of those parties. *Koster*, 903 F.2d at 139. Taking those factors into consideration, we find that the

district court properly declined to apportion fees against MDNR.

IV.

In the cross—appeal, GTB maintains that the district court erred in denying its request for attorney's fees for ancillary proceedings in the *United Sates v. Michigan* litigation, as well as the state court civil and criminal litigation involving GTB member, George Duhamel. An award of fees for ancillary proceedings is proper if the work was "useful and of a type ordinarily necessary" to secure the relief requested in the primary proceeding. *Webb v. Dyer Cty. Bd. of Ed.*, 471 U.S. 234, 243 (1985). It is within the discretion of the district court to decide whether ancillary fees are appropriate. *Id.* at 243—44; *see also Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 561 (1986),

The district court found that although some of the legal work performed in the *United States v. Michigan* case may have aided in the subsequent action against the municipalities, it would be patently unfair and contrary to established to assess these defendants for such fees since neither defendant appeared as a party in the earlier matter. It further concluded that it was doubtful that the hours were necessary or useful to the resolution of this litigation. Wee agree. The district court was within its discretion to deny fees for the ancillary proceeding where neither of the

municipalities were parties to that litigation and indeed were informed by the district court that they would not be permitted to file pleadings in that litigation. J.A. at 42. Moreover, there is no evidence that the work done in the *United States v. Michigan* proceeding was necessary to the primary litigation. Similarly, the district court did not err by declining to award attorney's fees for the state court ancillary proceedings. GTB was never a named party of those criminal proceedings and the work, as the district court noted, was performed largely on behalf of someone other than GTB. Moreover, we generally do not grant attorneys fees when a party chooses to defend criminal proceedings before instituting civil rights litigation relating to the matter. *See Greer v. Holt,* 718 F.2d 206, 208 (6th Cir. 1983).

We AFFIRM.

RYAN, Circuit Judge, concurring. In my dissenting opinion in Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Michigan Department of Natural Resources, 141 F.3d 635 (6th Cir. 1998), I stated:

> In my judgment, the Grand Traverse Band of Ottawa & Chippewa Indians is not entitled to moor its fishing vessels at the marinas at Leland or Northport either by virtue of the Treaties of 1836 and 1855, or my virtue of the consent judgment between the tribe and the State of Michigan.

I explained my reasons for that view, but my colleagues were not persuaded and held otherwise.

Consequently, for the reasons explained in my brother's opinion in this case, I agree that the plaintiff's unaddressed but not insubstantial 42 U.S.C. § 1983 claim justifies an award of attorney fees under § 1988.

96-1168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

6th Circuit
Court of Appeals
Filed 6/10/98

Grand Traverse Band of Ottawa and Chippewa Indians,
Plaintiff-Appellee,

v.

Director, Michigan Department of Natural Resources,
Defendant,

Township of Leland, et al
Defendants-Appellants.

ORDER

BEFORE: JONES, NELSON, and RYAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

Mes-quaw-buck,	Was-baw-que-ke-aw,
Mess-Sett,	Naush-waw-pi-tant,
Muck-kose,	Che-qua-sau-quah.

C. Carter, Secretary. Edward McCartney, Enteprt.

To the Indian names are subjoined marks.

ARTICLES OF A TREATY

Made and concluded at the city of Washington in the District of Columbia, between Henry R. Schoolcraft, commissioner on the part of the United States, and the Ottawa and Chippewa nations of Indians, by their chiefs and delegates.

March 28, 1836.
Proclamation,
May 27, 1836.

Cession of Land to the U.S.

ARTICLE FIRST. The Ottawa and Chippewa nations of Indians cede to the United States all the tract of country within the following boundaries: Beginning at the mouth of Grand river of Lake Michigan on the north bank thereof, and following up the same to the line called for, in the first article of the treaty of Chicago of the 29th of August 1821, Ante, p. 218 thence, in a direct line, to the head

of Thunder-bay river, thence with the line established by the treaty of Saganaw of the 24th of September 1819, to the mouth of said river, thence northeast to the boundary line in Lake Huron between the United States and the British province of Upper Canada, thence northwestwardly, following the said line, as established by the commissioners acting under the treaty of Ghent, through the straits, and river St. Mary's, to a point in Lake Superior north of the mouth of *Gitchy Seebing*, or Chocolate river, thence south to the mouth of said river and up its channel to the source thereof, thence, in a direct line to the head of the *Skonawba* river of Green bay, thence down the south bank of said river to its mouth, thence, in a direct line, through the ship channel into Green bay, to the outer part thereof, thence south to a point in Lake Michigan west of the north cape, or entrance of Grand river, and thence east to the place of beginning, at the cape aforesaid, comprehending all the lands and islands, within these limits, not hereinafter reserved.

Reservations in common.

ARTICLE SECOND. From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts, namely: One tract of fifty thousand acres to be located on Little Traverse bay: one tract of twenty thousand acres to be located on the north shore of Grand Traverse bay, one tract of seventy thousand acres to

be located on, or, north of the *Pieire Marquetta* river, one tract of one thousand acres to be located by Chingassanoo,---—or time Big Sail, on the Cheboigan. One tract of one thousand acres, to be located by Mujeekewis, on Thunder-bay river.

Reservations for Chippewas.

ARTICLE THIRD. There shall also be reserved for the use of the Chippewas living north of the straits of Michilimackinac, the following tracts, that is to say: Two tracts of three miles square each, on the north shores of the said straits, between *Point-au-Barbe* and *Mille Coquin* river, including the fishing grounds in front of such reservations, to be located by a council of the chiefs. The Beaver islands of Lake Michigan for the use of the Beaver-island Indians. Round island, opposite Michilimackinac, as a place of encampment for the Indians, to be under the charge of the Indian department. The islands of time *Chenos,* with a part of the adjacent north coast of Lake Huron, corresponding in length, and one mile in depth. Sugar island, with its islets, in the river of St. Mary's. Six hundred and forty acres, at the mission of the Little Rapids. A tract commencing at the mouth of *Pississowining* river, south of Point Iroquois, thence running up said stream to its forks, thence westward, in a direct line to the Red water lakes, thence across the portage to the Tacquimenon river, and down the same to its mouth, including the small islands and fishing grounds, in

front of this reservation. Six hundred and forty acres, on Grand island, and two thousand acres, on the main land south of it. Two sections, on the northern extremity of Green bay, to be located by a council of the chiefs. All the locations, left indefinite by this, and the preceding articles, shall be made by the proper chiefs, under the direction of the President. It is understood that the reservation for a place of fishing and encampment, made under the treaty of St. Mary's o the 16th of June 1820 (Ante, p.206), remains unaffected by this treaty.

Payments to be made tc the Indians.

ARTICLE FOURTH. In consideration of the foregoing cessions, the United States engage to pay the Ottawa and Chippewa nations, the following sums, namely. **1st**. An annuity of thirty thousand dollars per annum, in specie, for twenty years; eighteen thousand dollars, to be paid to the Indians between Grand river and the Cheboigun; three thousand six hundred dollars, tot he Indians on the Huron shore, between Cheboigan and Thunder-bay river; and seven thousand four hundred dollars, to the Chippewas north of the straits, as far as the cession extends; the remaining one thousand dollars, to be invested in stock by the Treasury Department and to remain incapable of being sold, without the consent of the President and Senate, which may, however, be given, after the expiration of twenty-one years. **2nd**. Five thousand dollars per annum, for the purposes of

education, teachers, school-houses, and books in their own language, to be continued twenty years, and as long thereafter as Congress may appropriate for the object. **3rd.** Three thousand dollars for missions, subject to the conditions mentioned in the second clause of this article. **4th.** Ten thousand dollars for agricultural implements, cattle, mechanics' tools, and such other objects as the President may deem proper. **5th.** Three hundred dollars per annum for vaccine matter, medicine, and the services of physicians, to be continued while the Indians remain on their reservations. **6th.** Provisions to the amount of two thousand dollars; six thousand five hundred pounds tobacco; one hundred barrels of salt, and five hundred fish barrels, annually, for twenty years. **7th.** One hundred and fifty thousand dollars, in goods and provisions, on the ratification of this treaty, to be delivered at Michilimackinac.

Payments of claims against the Indians.

ARTICLE FOURTH. The sum of three hundred thousand dollars shall be set apart for the payment of just debts against the said Indians. All claims for such debts shall be examined by a commissioner to be appointed by the President and Senate, who shall act under such instructions as may be given to him, by the order of the President, for the purpose of preventing the allowance of unjust claims. The investigation shall be made at Michilimackinac, and no claims shall be allowed, excerpt

such as were contracted by Indians living within the district of country hereby ceded, and to citizens or residents of the United States. No claim shall be paid out of this fund unless the claimant will receive the sum allowed to him, as full payment of all debts, due to him by the said Indians. If the fund fall short of the full amount of just debts, then a ratable division shall be made. If it exceeds such amount, the balance shall be paid over to the Indians, in the same manner, that annuities are required by law to be paid.

Provision for half-breeds, & c.

ARTICLE SIX. The said Indians being desirous of making provisions for their half-breed relatives, and the President having determined, that individual reservations shall not be granted, it is agreed, that in lieu thereof, the sum of one hundred and fifty thousand dollars shall be set apart as a fund for said half-breeds. No personal shall be entitled to any part of said fund, unless he is of Indian descent and actually resident within the boundaries described in the first article of this treaty, nor shall any thing be allowed to any such person, who may have received any allowance at any previous Indian treaty. The following principles, shall regulate the distribution. A census shall be taken of all the men, women, and children, coming within this article. As the Indians hold in higher consideration, some of their half-breeds than others, and as there is much difference in their capacity to use and take

care of property, and, consequently, in their power to aid their Indian connexions, which furnishes a strong ground for this claim, it is therefore, agreed, that at the council to be held upon this subject, the commissioner shall call upon the Indian chiefs to designate, if they require it, three classes of these claimants, the first of which, shall receive one-half more than the second, and the second, double the third. Each man, woman and child shall be enumerated, and an equal share, in the respective classes, shall be allowed to each. If the father is living with the family, he shall receive the shares of himself, his wife and children. If the father is dead, or separated from the family, and the mother is living with the family, she shall have her own share, and that of the children. If the father and mother are neither living with the family, or if the children are orphans, their shall be retained till they are twenty-one years of age; provided, that such portions of it as may be necessary may, under the direction of the President be from time to time applied for their support. All other person as at the age of twenty-one years, shall receive their shares agreeably to the proper class. Out of the said fund of one hundred and fifty thousand dollars, the sum of five thousand dollars shall be reserved to be applied, under the direction of the President, to the support of such of the poor half breeds, as may require assistance, to be expended in annual installments for the term of ten years, commencing with the second year. Such of the half-breeds, as may be judged

incapable of making a proper use of the money, allowed them by the commissioner, shall receive the same in installments, as the President may direct.

Two additional blacksmiths, & c.

ARTICLE SEVENTH. In consideration of the cessions above made, and as a further earnest of the disposition felt to do full justice to the Indians, and to further their well being, the United States engage to keep two additional blacksmith-shops, one of which, shall be located ont he reservation north of Grand river, and the other at the *Sault Ste. Marie.* A permanent interpreter will be provided at each of these locations. It is stipulated to renew the present dilapidated shop at Michilimackinac, and to maintain a gunsmith, in addition to the present smith's establishment, and to build a dormitory for the Indians visiting the post, and appoint a person to keep it, and supply it with fire-wood. It is also agreed, to support two farmers and assistants, and two mechanics, as the President may designate, to teach and aid the Indians, in agriculture, and the mechanic arts. The farmers and mechanics, and the dormitory, will be continued for ten years, and as long thereafter, as the President may deem this arrangement useful and necessary; but the benefits of the other stipulations of this article, shall be continued beyond the expiration of the annuities, and it is understood that the whole of this article shall stand in force, and inure to the

benefit of the Indians, as long after the expiration of the twenty years as Congress may appropriate for the objects.

Locations to be sought for;
Payment for improvements, & c.

ARTICLE EIGHT. It is agreed, that as soon as the said Indians desire it, a deputation shall be sent to the west of the Mississippi, and to the country between Lake Superior and the Mississippi, and a suitable location shall be provided for them, among the Chippewas, if they desire it, and it can be purchased upon reasonable terms, and if not, then in some portion of the country west of the Mississippi, which is at the disposal of the United States. Such improvements as add value to the land, hereby ceded, shall be appraised, and the amount paid to the proper Indian. But such payment shall, in no case, be assigned to, or paid to, a white man. If the church on the Cheboigan, should fall within this cession, the value shall be paid to the band owning it. The mission establishments upon the Grand river shall be appraised and the value paid to the proper boards. When the Indians with it, the United States will remove them, at their expense, provide them a year's subsistence in the country to which they go,, and furnish the same articles and equipments to each person as are stipulated to be given to the Pottowatomies (Ante, p. 431.) in the final treaty of cession concluded at Chicago.

Payment to half-breeds

in leu of reservations.

ARTICLE NINTH. Whereas the Ottawas and Chippewas, feeling a strong consideration for aid rendered by certain of their half-breeds on Grand river, and other parts of the country ceded, and wishing to testify their gratitude on the present occasion, have assigned such individuals certain locations of land, and united in a strong appeal for the allowance of the same in this treaty; and whereas not such reservations can be permitted in carrying out the special directions of the President on this subject, it is agreed, that, in addition to the general fund set apart for half-breed claims, in the sixth article, the sum of forty-eight thousand one hundred and forty-eight dollars shall be paid for the extinguishment of this class of claims, to be divided in the following manner: To Rix Robinson, in lieu of a section of land, granted to his Indian family, on the Grand river rapids, (estimated by good judges to be worth half a million,) at the rate of thirty-six dollars an acre: To Leonard Slater, in trust for Chiminonoquat, for a section of land above said rapids, at the rate of ten dollars an acre: To John A. Drew, for a tract of one section and three quarters, to his Indian family, at Cheboigan rapids at the rate of four dollars; To Edward Biddle, for one section to his Indian family at the fishing grounds, at the rate of three dollars: To John Holiday, for five sections of land to five persons of his Indian family, at the rate of one dollar and twenty-five cents; To Eliza Cook, Sophia Biddle, and Mary

Holiday, one section of land each, at two dollars and fifty cents: To Augustin Hamelin jr, being of Indian descent, two sections, at one dollar and twenty-five cents: To William Lasley, Joseph Daily, Joseph Trotier, Henry A. Levake, for two sections each, for their Indian families, at one dollar and twenty-five cents: To Luther Rice, Joseph Lafrombois, Charles Butterfield, being of Indian descent, and to George Moran, Louis Moran, G.D. Williams, for half-breed children under their care, and to Daniel Marsac, for his Indian child, one section each, at one dollar and twenty-five cents.

Payments to chiefs.

ARTICLE TENTH. The sum of thirty thousand dollars shall be paid to the chiefs, on the ratification of this treaty, to be divided agreeably to a schedule hereunto annexed.

Annuities to two aged chiefs.

ARTICLE ELEVENTH. The Ottowas having consideration for one of their aged chiefs, who is reduced to poverty, and it being known that he was a firm friend of the American Government, in that quarter, during the late ware, and suffered much in consequence of his sentiments, it is agreed, that an annuity of one hundred dollars per annum shall be paid to Nigweegon or the Wing, during his natural life, in money or goods, as he may choose. Another of the chiefs of said nation, who attended the treaty of Greenville

in 1793, and is now, at a very advanced age, reduced to extreme want, together with his wife, and the Government being apprized that he has pleaded a promise of Gen. Wayne, in his behalf, it is agreed that Cusco of Michilimackinac shall receive an annuity of fifty dollars per annum during his natural life.

Expenses of this treaty to be paid by U.S.

ARTICLE TWELFTH. All expenses attending the journeys of the Indians form, and to their homes, and their visit at the seat of Government, together with the expenses of the treaty, including a proper quantity of clothing to be given them, will be paid by the United States.

Right of hunting on the lands ceded.

ARTICLE THIRTEENTH. The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

In testimony whereof, the said Henry R. Schoolcraft, commissioner on the part of the United States, and the chiefs and delegates of the Ottawa and Chippewa nations of Indians have hereunto set their hands, at Washington, the seat of Government, this twenty-eighth day of March, in the year one thousand eight hundred and thirty-six.

Oroun Aishkum, of	Maskigo	Kawgayosh, of	Sault Ste. Marie,
Wassangozo, of	do.	by Maidosagee,	
Osawya, of	do.	Apawkozigun of	L'Arbre Croche,
Wabi Windego, of	Grand river	Keminitchagun, of	do.
Megiss Ininee, of	do.	Tawaganee, of	do.
Nabun Ageezhig, of	do.	Kinoshamaig, of	do.
Winnimissagee, of	do.	Naganigobowa, of	do.
Mukutaysee, of	do.	Oniasino, of	do.
Wasaw Bequm, of	do.	Mukuday Benais of	do.
Ainse, of	Michilimackinac,	Chingassamo, of	do.
Chabowaywa, of	do.	Aishquagonabee, of	Grand
Jawba Wadick, of	Sault Ste. Marie,	Traverse,	
Waub Ogeeg, of	do.	Akosa, of	do.
		Oshawun Epensaysee,	do.

John Hulbert, Secretary. Lucius Lyon. R.P. Parrott, Capt. U.S. Army. W.P.Zantzinger, Purser U.S. Navy. Josiah F. Pol. John Holiday. John A. Drew. Rix Robinson. Leonard Slater. Louis Moran. Augustin Hamelin, jr. Henry A. Levake. William Lasley. George W. Woodward. C.O. Ermatinger.

To the Indian names are subjoined marks.

Schedule referred to, in the tenth article.

Chiefs entitled to $500 each.

1. The following chiefs constitute the first class, and are entitled to receive fund hundred dollars each, namely: On Grand river, Muccutay Osha, Namatippy, Nawequa Geezhig or Noon Day, Nabun Egeezhig son of Kewayguabowequa, Wabi Windego or the White Giant, Cawpemossay or the Walker, Mukutay Oquot or Black

Cloud, Megis Ininee or Wampum-man, Winnimissagee: on the Maskigo, Osawya, and Owun Aishcum; at L'Arbre Croche, Apawkozigun, or Smoking Weed, Nisowakeout, Keminechawgun; at Grand Travers, Aishquagonabee, or the Feather of Honor, Chabwossun, Mikenok: on the Chebiogan, Chigassamo, or the Big Sail; at Thurnder-bay, Mujeekiwiss; on the Manistic North, Mukons Ewyan; at Oak Point on the straits, Ains: at the Chenos, Chabowaywa: at Sault Ste. Marie, Iawba Wadick and Kewayzi Shawano; at Tacquimenon, Kawgayosh; at Grand Island, Oshawun Epenaysee, or the South Bird.

2. The following chiefs constitute the second class, and are entitled to receive two hundred dollars each, namely: On Grand river, Keeshaowash, Nugogikaybee, Kewaytowaby, Wapoos or the Rabbit, Wabitouguaysay, Kewatondo, Zhaquinaw, Nawiqua Geezhig of Flat river, Kenaytinunk, Weenong, Pabawboco, Windecowiss, Muccutay Penay or Black Patridge, Kaynotin Aishcum, Boynashing, Shagwabeno son of White Giant, Tushetowun, Keway Gooshcum the former head chief, Pamossayga; at L'Abre Croche, Saitondowa, Ogiman Wininee, Megisawba, Mukuday Benais; at the Cross, Nishcajininee, Nawamushcota, Pabamitabi, Kimmewun, Gitchy Mocoman; at Grand Traverse, Akosa, Nebauquaum, Kabibonocca; at Little Traverse, Miscomamaingwa or Red Butterfly, Keezhigo Benais, Pamanikinong, Paimossega; on the

Chegoigan, Chonees, or Little John, Shaweenossegay; on Thunder bay, Suganikwato; on Maskigo, Wassangazo; on Ossigomico or Platte river, Kaigwaidosay; at Manistee, Keway Gooshcum: on river Pierre Markette, Saugima: at Saulte Ste. Marie, Neegaubayun, Mukudaywacquot, Cheegud; at Carp river west of Grand island, Kaug Wyanais: at Mille Cocquin on the straits, Aubunway: at Michilimackinac, Missutigo, Saganosh, Akkukogeesh, Chebyawboas.

Chiefs entitled to $100 each.

3. The following persons constitute the third class, and are entitled to one hundred dollars each, namely: Kayshewa, Penasee or Gun lake, Kenisoway, Keenabie of Grand river: Wasso, Mosaniko, Unwatin Oashcum, Nayogirna, Itawachkochi, Nanaw Orgomoo, Gitchy, Peendowan or Scabbard, Mukons, Kinochimaig, Tekamosimo, Pewaywitum, Mudji Keguabi, Kewayaum, Paushkizigun or Big Gun, Onaausio, Ashquabaywiss, Negaunigabowi, Petossegay, of L'Arbre Croche: Poiees or Dwarf and Pamossay of Cheboigan: Gitchy Ganocquot and Pamossegay of Thunder bay: Tabusshy Geeshick and Mikenok, of Carp river south of Grand Traverse; Wapooso,, Kaubinau, and Mudjeekee of river Pierre Markuette: Pubokway, Manitowaba, and Mishewatig, of White river: Shawun Epenaysee and Agausgee of Grand Traverse: Micqumisut, Chusco of Mackinac; Keeskigjiwun, Waub

Ojeeg, Aukudo, Winikis, Jaubeens, Maidosagee, Autya, Ishquagunaby, Shaniwaygwunabi son of Kakakee, Nittum Egabowi, Magisanikway, Ketekewegauboway, of Sault Ste. Marie: Chegauzehe and Waubudo of Grand island: Ashegons, Kinuwais, Misquaonaby and Mongons of Carp and Chocolate rivers: Gitchy Penaisson of Grosse Tete, and Waubissaig of Bay de Nocquet: Kainwaybekis and Pazhikwaywitum of Beaver island: Neezhick Epenais of the Ance: Ahdanima of Manistic: Mukwyon, Wahzahkoon, Oshawun, Oneshannocquot of the north shore of Lake Michigan: Nagauniby and Keway Gooshkum of the Chenos.

HENRY R. SCHOOLCRAFT,

Commissioner.

SUPPLEMENTAL ARTICLE

How certain provisions in preceding articles are to be construed.

To guard against misconstruction in some of the foregoing provisions, and to secure, by further limitations, the just rights of the Indians, it is hereby agreed: that no claims under the fifth article shall be allowed for any debts contracted previous to the late war with Great Britain, or for goods supplied by foreigners to said Indians, or by citizens, how did not withdraw from the country, during its temporary occupancy by foreign troops, for any trade carried on by such persons during the said period. And it is also agreed: that no person receiving any commutation for a reservation, or any portion of the fund provided by the mutation for a reservation, or any portion of the fund provided by the sixth article of this treaty, shall be entitled to the benefit of any part of the annuities herein stipulated. Nor shall any of the half-breeds, or blood relatives of the said tribes, commuted with, commuted with, under the provisions of the ninth article, have any further claim on the general commutation fund, set apart to satisfy reservation claims, in the said sixth article. It is also understood, that the personal annuities, stipulated in the eleventh article, shall be apid in specie in the same manner that other annuities are paid. Any excess of the funds set apart in the fifth and sixth articles, shall, in lieu of being paid to the Indians, be retained and vested by the Government in stock

under the conditions mentioned in the fourth article of this treaty.

In testimony whereof, the parties above recited, have hereunto set their hands, at Washington, the seat of Government, this thirty-first day of March, in the year one thousand eight hundred and thirty-six.

HENRY R. SCHOOLCRAFT.

Oroun Aishkum, of	Maskigo	Kawgayosh, of	Sault Ste. Marie,
Wassangozo, of	do.	by Maidosagee,	
Osawya, of	do.	Apawkozigun of	L'Arbre Croche,
Wabi Windego, of	Grand river	Keminitchagun, of	do.
Megiss Ininee, of	do.	Tawaganee, of	do.
Nabun Ageezhig, of	do.	Kinoshamaig, of	do.
Winnimissagee, of	do.	Naganigobowa, of	do.
Mukutaysee, of	do.	Oniasino, of	do.
Wasaw Bequm, of	do.	Mukuday Benais of	do.
Ainse, of	Michilimackinac,	Chingassamo, of	do.
Chabowaywa, of	do.	Aishquagonabee, of	Grand
Jawba Wadick, of	Sault Ste. Marie,	Traverse,	
Waub Ogeeg, of	do.	Akosa, of	do.
		Oshawun Epensaysee,	do.

John Hulbert, Secretary. Robert Stewart, Wm. Mitchell, John A. Drew, Augustin Hamelin, jr., Rix Robinson, C.O. Ermatinger.

To the Indian names are subjoined marks.

[Note.--The foregoing treaty, and supplementary article, was ratified and confirmed with the following amendments, as expressed in the resolution of the Senate:

ARTICLE TWO, line two, after the work, "tracts," insert the following words to wit: "for the term of five years from the

date of the ratification of this treaty, and no longer;" unless the United States grant them permission to remain on said lands for a longer period.

ARTICLE THREE, after the word "tracts," in the second line, insert the following words, to wit:

For the term of five years from the date of the ratification of this treaty, and no longer, unless the United States grant them permission to remain on said lands for a longer period.

ARTICLE FOUR, --at the close thereof insert these words--"and also the sum of two hundred thousand dollars, in consideration of changing the permanent reservations in articles two and three to reservations for five years only, to be paid whenever their reservations shall be surrendered, and until that time the interest on said two hundred thousand dollars shall be annually paid to the said Indians."

ARTICLE FIVE, --Strike out the whole article and insert the following: "The sum of three hundred thousand dollars shall be apid to the said Indians to enable them with the aid and assistance of their agent, to adjust and pay such debts as they may justly owe, and the overplus if any to apply to such other use as they may think proper.

ARTICLE EIGHT, --Strike out after the work "the" where it first occurs in line two, to the work "States," in the eighth line, and insert in lieu, thereof these words--"Southwest of the Missouri river, there to select a suitable place for the final settlement of said Indians, which country, so selected, and of reasonable extent, the United States will forever guaranty and secure to said Indians.

ARTICLE EIGHT, --Strike out all between the word "it" in the eleventh line, and the word "when" in the thirteenth line, and

insert these words: "The net proceeds of the sale of the one hundred and sixty acres of land, upon the Grand river, upon which the Missionary Society have erected their buildings, shall be paid to the said Society in lieu of the value of their said improvements."]

TREATY WITH THE OTTAWAS AND CHIPPEWAS, July 31, 1855.

FRANKLIN PIERCE,

President of the United States of America:

July 31, 1855.

To all persons to whom these presents shall come, greeting:

Preamble.

WHEREAS a treaty was made and concluded at the city of Detroit, in the State of Michigan, on the thirty-first day of July, eighteen hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States, and the Ottowa and Chippewa Indians of Michigan, parties to the treaty of March twenty-eight, eighteen hundred and thirty-six, which treaty is in the works and figures following to wit:

- Title.

Articles of agreement and convention made and concluded at the city of Detroit in the State of Michigan this thirty-first day of July, one thousand eight hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States and the Ottowa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836.

In view of the existing condition of the Ottowas and Chippewas, and of their legal and equitable claims against the United States, it is agreed between the contracting parties as following:--

Certain lands in Michigan to be withdraw from sale.

ARTICLE I. The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:

For the use of the six bands at and near Sault Ste. Marie.

First. For the use of the six bands residing at and near Sault Ste. Marie, sections 13, 14, 23, 24, 25, 26, 27, and 28, in township 47, north range 5 west; sections 18, 19, and 30 in township 47, north, range 4 west, and section 11, 12, 13, 14, 15, 22, 23, 25, and 26, in township 47 north, range 3 west, and section 28 in township 47 north, range 2 west; sections 2, 3, 4, 11, 14, and 15 in township 47 north, range 2 east, and section 34 in township 48 north, range 2 east; sections 6, 7, 18, 19, 20, 28, 29, and 33, in township 45 north, range 2 east; sections 1, 12, and 13, in township 45 north, range 1 east, and section 4 in township 44 north, range 2 east.

For the use of the bands north of the Straits of Mackinac.

Second. For the use of the bands who wish to reside north of the Straits of Mackinac, township 42 north, ranges 1 and 2 west; township 43 north, range 1 west, and township 44 north, range 12 west.

For the Beaver Island band.

Third. For the Beaver Island band,--High Island, and Garden Island in Lake Michigan, being fractional townships 38 and 39 north, range 11 west--40 north, range 10 west, and in part 39 north, range 9 and 10 west.

For certain other bands.

Fourth. For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34 to 39, inclusive north, range 5 west--townships 34 to 38, inclusive north, range 6 west,--townships 34, 36, and 37, north, range 7 west, and township 34 north, range 8 west.*

For bands who are usually paid at Grand Traverse township.

*Fifth.** For the bands who usually assemble for payment at Grand Traverse township 32 north, range 10 west--township 29 to 32, north inclusive, range 11, west--townships 29 to 31, north inclusive, range 12 west--township 29 north, range 13 west, and the east half of township 29 north, range 9 west.

For the Grand River bands, including that of Me-tay-o-meg.

*Sixth.** For the Grand River bands, including the band of which Me-tay-o-meg is chief--four adjoining townships of land in the county of Mecosta, and four adjoining townships north of Muskegon River, and west of range 12 west, which town locations, of four townships each, are to be selected by said Grand River Indians within three months from this date and notice thereof given to their agent.

For the Cheboygan band.

*Seventh.** For the Cheboygan band, one township of land in Cheboygan county, to be selected and notice given as above provided.

For the Thunder Bay band.

Eighth. For the Thunder Bay band, section 25 and 36 in township 30 north, range 7 east, and section 22 in township 30 north, range 8 east.

Purchase for bands who wish to locate near the Missionary land at Iroquois Point.

Should either of the bands residing near Sault St. Marie determine to locate near the lands owned by the missionary society of the Methodist Episcopal church at Iroquois Point, in addition to those who now reside there, it is agreed that the United States will purchase as much of said lands for the use of the Indians as the society may be willing to sell at the usual government price.

Grant of land to each Indian.

The United State will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over 21 years of age, 40 acres of land, and to each family of orphan children under 21 years of age containing two or more persons, 80 acres of land, and to each single orphan child under 21 years of age, 40 acres of land to selected and located within the several tracts of land hereinbefore described under the following rules and regulations:--

Selection how made.

Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong--*Provided*, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

List of those entitled to be prepared.

For the purpose of determining who may be entitled to land under the provisions of this article, lists shall be prepared by the Indian agent, which lists shall contain the names of all persons entitled, designating them in four classes. Class 1st, shall contain the names of heads of families; class 2d, the names of single persons over 21 years of age; class 3d, the names of orphan children under 21 years of age, comprising families of two or more persons, and class 4th, the names of single orphan children under 21 years of age, and no person shall be entered in more than one class. Such lists shall be made and closed by the first day of July, 1856, and thereafter no applications for the benefits of this article will be allowed.

Selections may be made within five years.

At any time within five years after the completion of the lists, selections of lands may be made by the persons entitled thereto, and a notice thereof, with a description of the land selected, filed in the office of the Indian agent in Detroit, to be by him transmitted to the office of Indian Affairs in Washington City.

To be according to usual subdivisions.

All selections of land under this article must be made according to the usual legal subdivisions; and fractional lots, if containing less than 60 acres, may be regarded as forty-acre lots, if over sixty and less than one hundred and twenty acres as eighty-acre lots. Selections for orphan children may be made by themselves or their friends, subject to the approval of the agent.

Possession may be taken at once.

After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United Stats will thenceforth and until the issuing of patents as hereinafter provided, hold the same inn trust for such persons, and certificates shall be issued in a suitable form guaranteeing and securing to the holders their possession and an ultimate title to the land.

Sales within ten years forbidden.

But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein.

After ten years a patent shall issue and restriction on sale cease.

After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form, to each original holder of a certificate for the land described therein, provided that such restriction shall cease only upon the actual issuing of the patent; and provided further

that the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. And provided also, that after the expiration of ten years, if individual cases hall be reported to the President by the Indian agent, of person who may then be incapable of managing their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and proper.

Provision for case of death.

Should any of the heads of families die before the issuing of the certificates or patents herein provided for, the same shall issue to the heirs of such deceased persons.

To whom this treaty shall extend

The benefits of this article will be extended only to those Indians who are at this time actual residents of the State of Michigan, and entitled to participate in the annuities provided by the treaty of March 28, 1836;
but this provision shall not be construed to exclude any Indian now belonging to the Garden River Band of Sault Ste. Marie.

After five years the remaining lands may be entered in the usual manner by Indians for five years, and then by any one.

All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within

five years, shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre as other adjacent pubic lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.

Grants for churches, schools & c. may be made. Indians may sell with President's consent.

Nothing contained herein shah be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.*

Payments to said Indians.

ARTICLE 2. The United States will also pay to the said Indians the sum of five hundred and thirty-eight thousand and four hundred dollars, in manner following, to wit:

$80,000 in ten equal annual instalments.

First. Eighty thousand dollars for educational purposes to be paid in ten equal annual instalments of eight thousand

dollars each, which sum shall be expended under the direction of the President of the United States; and in the expenditure of the same, and the appointment of teachers and management of schools, the Indians shall be consulted, and their views and wishes adopted so far as they may be just and reasonable.

$75,000 in five equal annual instalments.

Second. Seventy-five thousand dollars to be paid in five equal annual instalments of fifteen thousand dollars each in agricultural implements and carpenters' tools, household furniture and building materials, cattle, labor, and all such articles as may be necessary and useful for them in removing to the homes herein provided and getting permanently settled thereon.

$42,400 for blacksmith's shops.

Third. Forty-two thousand and four hundred dollars for the support of four blacksmith shops for ten years.

$306,000 "to be paid per capita."

Fourth. The sum of three hundred and six thousand dollars in coin, as follows:——ten thousand dollars of the principal and the interest on the whole of said last—mentioned sum remaining unpaid at the rate of five percent annually for ten years, to be distributed *per capita* in the usual manner for paying annuities. And the sum of two hundred and six thousand dollars remaining unpaid at the expiration of ten years, shall be then due and payable, and if the Indians then require the payment of said sum in coin, the same shall be distributed *per capita* in the same manner as annuities are paid, and in not less than four equal annual instalments.

$35,000 in ten annual instalments.

Fifth. Time sum of thirty-five thousand dollars in ten annual instalments of three thousand and five hundred dollars each to be paid only to the Grand River Ottawas, which is in lieu of all permanent annuities to which they may be entitled by former treaty stipulations, and which sum shall be distributed in the usual manner *per capita.*

Liabilities under former treaties released.

ARTICLE 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however, the right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 161, 1820.

Interpreters.

ARTICLE 4. The interpreters at Sault St. Marie, Mackinac, and for the Grand River Indians, shall be continued, and another provided at Grand Traverse, for the term of five years, and as much longer as the President may deem necessary.

Tribal organization dissolved in most respects.

Future treaties to be binding.

ARTICLE 5. The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented.

Treaty, when to be binding.

ARTICLE 6. This agreement shall be obligatory and binding on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof the said George W. Manypenny and the said Henry C. Gilbert, commissioners as aforesaid, and the undersigned chiefs and headmen of the Ottawas and Chippewas, have hereto set their hands and seals, at the city of Detroit the day and year first above written.

GEO. W. MANYPENNY, [L.S.]
HENRY C. GILBERT, [L.S.]

Commissioners on the part of the United States

J. LOGAN CHIPMAN, *Secretary*
RICH'D M. SMITH, *Secretary*

Sault Ste. Marie Bands.

O-SHAW-WAW-NO-KE-WAIN-ZE, chief,	his x mark. [L.S.]
WAW-BO-JIEG, chief,	his x mark. [L.S.]
KAY-BAY-NO-DIN, chief,	his x mark. [L.S.]
O-MAW-NO-MAW-NE, chief,	his x mark. [L.S.]
SHAW-WAN, chief,	his x mark. [L.S.]
PI-AW-BE-DAW-SUNG, chief,	his x mark. [L.S.]
WAW-WE-GUN, headman,	his x mark. [L.S.]
PA-NE-GWON, headman,	his x mark. [L.S.]
BWAN, headman,	his x mark. [L.S.]
TAW-MEECE, headman,	his x mark. [L.S.]
NAW-O-GE-ZHICK, headman,	his x mark. [L.S.]
SAW-GA W-GIEW, headman,	his x mark. [L.S.]

Grand River Bands.

NE-BAW-NAY-GE-ZHICK, chief,	his x mark. [L.S.]
SHAW-GWAW-BAW-NO, chief,	his x mark. [L.S.]
AISH-KE-BAW-GOSH, 2d chief,	his x mark. [L.S.]
NAY-WAW-GOO, chief,	his x mark. [L.S.]
NE-BE-NE-SEH, chief,	his x mark. [L.S.]
WAW-BE-GAY-KAKE, chief,	his x mark. [L.S.]
KE-NE-WE-GE-ZHICK, chief,	his x mark. [L.S.]

MEN-DAW-WAW-BE, chief,	his x mark. [L.S.]
MAISH-KE-AW-SHE, chief,	his x mark. [L.S.]
PAY-SHAW-SE-GAY, chief,	his x mark. [L.S.]
PAY-BAW-ME, headman,	his x mark. [L.S.]
PE-GO, chief,	his x mark. [L.S.]
CHING-GWOSH, chief,	his x mark. [L.S.]
SHAW-BE-QUO-UNG, chief,	his x mark. [L.S.]
ANDREW J. BLACKBIRD, headman,	his x mark. [L.S.]
KE-SIS-SWAW-BAY, headman,	his x mark. [L.S.]
NAW-TE-NAISH-CUM, headman,	his x mark. [L.S.]

Grand Traverse Bands.

AISH-QUAY-GO-NAY-BE, chief,	his x mark. [L.S.]
AH-KO-SAY, chief,	his x mark. [L.S.]
KAY-QUAY-TO-SAY, chief,	his x mark. [L.S.]
O-NAW-MAW-NINCE, chief,	his x mark. [L.S.]
SHAW-BWAW-SUNG, chief,	his x mark. [L.S.]
LOUIS MICK-SAW-BAY, headman,	his x mark. [L.S.]
MAY-DWAY-AW-SHE, headman,	his x mark. [L.S.]
ME-TAY-O-MEIG, chief,	his x mark. [L.S.]
ME-NAW-QUOT, headman,	his x mark. [L.S.]

Little Traverse Bands.

WAW-SO, chief,	his x mark. [L.S.]
MWAW-KE-WE-NAW, chief,	his x mark. [L.S.]
PE-TAW-SE-GAY, headman,	his x mark. [L.S.]
KE-NE-ME-CHAW-GUN, chief,	his x mark. [L.S.]
MAY-TWAY-ON-DAW-GAW-SHE, headman,	his x mark. [L.S.]
ME-GE-SE-MONG, headman,	his x mark. [L.S.]
PI-A-ZHICK-WAY-WE-DONG, headman,	his x mark. [L.S.]

KEY-WAY-KEN-DO, headman, his x mark. [L.S.]

Mackinac Bands.

O-SAW-WAW-NE-ME-KE, chief, his x mark. [L.S.]
KE-NO-ZHAY, headman, his x mark. [L.S.]
PETER HANSE, headman, his x mark. [L.S.]
SHAW-BE-CO-SHING, chief, his x mark. [L.S.]
SHAW-BWAY-WAY, chief, his x mark. [L.S.]
PE-ANE, headman, his x mark. [L.S.]
SAW-GAW-NAW-QUAW-DO, headman, his x mark. [L.S.]
NAY-O-GE-MAW, chief, (Little Traverse,) his x mark. [L.S.]

Executed in the presence of

JNO. M.D. JOHNSTON, *Interpreter*
JOHN F. GODFROY, *Interpreter*
GBT. JOHNSTON, *Interpreter*
AUG. HAMLIN, *Interpreter*
L. CAMPAU,
JOSEPH F. MURSUL,
G.D. WILLIAMS,
P.B. BARBEAU,
A.M. FITCH,
W.H. GODFROY.

And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the fifteenth day of April, eighteen hundred and fifty-six, advise and consent to the

ratification of the same, with amendments, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

April 15, 1856.

"Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the treaty made and concluded with the Ottowas and Chippewas, on the thirty-first day of July, eighteen hundred and fifty-five; with the following

AMENDMENTS.

Amendments.
Article 1.

ARTICLE 1. At the end of the *"Fourth"* clause, strike out the words "township 34 north, range 8 west," and insert the words: "all that part of township 34, north range, 8 west, lying north of Pine River."

SAME ARTICLE. Strike out time *"Fifth"* clause, in the following words: "for the bands, who usually assemble for payment at Grand Traverse, township 32 north, range 10 west; townships 29 to 32 north, inclusive, range 11 west; townships 29 to 31 north, inclusive, range 12 west; township 29 north, range 13 west, and the east half of township 29 north, range 9 west," and insert, in lieu thereof, the following: "for the bands, who usually assemble for

payment at Grand Traverse, townships 29, 30, and 31, north range 11 west, and townships 29, 30, and 31 north range 12 west, and the east half of township 29, north range, 9 west."

SAME ARTICLE. Strike out the *"Sixth"* clause, in the following words: "for time Grand River bands, including the band, of which Me-tay-o-meg is chief, four adjoining townships of land in the county of Mecosta, and four adjoining townships north of Muskegon River, and west of range 12 west, which two locations of four townships each, are to be selected by said Grand River Indians within three months from this date, and notice thereof given to their agent," and insert, in lieu thereof, the following:
"for the Grand River bands, township 12, north range 15 west, and townships 15, 16, 17, and 18, north range, 16, west."

SAME ARTICLE. Strike out the "*Seventh*" clause, in the following words: "for the Cheboygan band, one township of land in Cheboygan county, to be selected, and notice given, as above provided;" and insert, in lieu thereof, the following: "for the Cheboygan band township 35, and 36, north range, 3 west.

SAME ARTICLE. Add the following at time end thereof:

Rights of settlers by preemption, saved.

"It is also agreed that any lands within the aforesaid tracts now occupied by actual settlers, or by persons entitled

to preemption thereon, shall be exempt from the provisions of this Article; provided, that such preemption claims shall be proved, as prescribed by law, before the first day of October next."

Indian purchasers under Graduation Act may sell.

"Any Indian, who may have heretofore purchased land for actual settlement under the act of Congress, known as the Graduation Act, may sell and dispose of the same; and in such case, no actual occupancy or residence by such Indians on land so purchased shall be necessary to enable him to secure a title thereto."

Grant to mission of Presbyterian Church at $1.25 per acre.

"In consideration of the benefits derived to the Indians on Grand Traverse Bay by the school and mission established in 1838, and still continued by the Board of Foreign Missions of the Presbyterian Church, it is agreed that the title to three separate pieces of land, being parts of tracts Nos. 3 and 4, of the west fractional half of section 35, township 30 north, range 10 west, on which are the mission and school buildings and improvements, not exceeding in all sixty-three acres, one hundred and twenty-four perches, shall be vested in the said Board on payment of $1.25 per acre; and the President of the United States shall issue a patent for the same to such person as the said Board shall appoint."

Further payment of $40,000 to pay debts.

"The United States will also pay the further sum of forty thousand dollars, or so much thereof as may be necessary, to be applied in liquidation of the present just indebtedness of the said Ottawa and Chippewa Indians; provided, that all claims presented shall be investigated under the direction of the Secretary of the Interior, who shall prescribe such rules and regulations for conducting such investigation, and for testing the validity and justice of the claims, as he shall deem suitable and proper; and no claim shall be paid except upon the certificate of the said Secretary that, in his opinion, the same is justly and equitably due; and all claimants, who shall not present their claims within such time as may be limited by said Secretary within six months from the ratification of the treaty, or whose claims, having been presented, shall be disallowed by him, shall be forever precluded from collecting the same, or maintaining an action thereon in any court whatever; and provided, also, that no portion of the money due said Indians for annuities, as herein provided, shall ever be appropriated to pay their debts under any pretence

Balance to be paid to the Chippewas.

whatever; provided, that the balance of the amount herein allowed, as a just increase of the amount due for the cessions and relinquishments aforesaid, after satisfaction of the awards of the Secretary of the Interior, shall be paid to the said Chippewas or expended for their benefit, in such

manner as the Secretary shall prescribe, in aid of any of the objects specified in the second article of this treaty."

Attest: ASBURY DICKINS, *Secretary.*

And whereas the said amendments having been submitted to the chiefs and headmen of the Ottawa and Chippewa tribes of Indians, the said chiefs and headmen having heard the same read and explained to them, did assent to and ratify the same, by an instrument, in the words and figures following, to wit:

Assent of Indians to Senate amendments.

We, the undersigned chiefs and headmen of the Chippewa Indians living near Sault Ste. Marie, Mich., having had the amendments adopted by the Senate of the United States to the treaty concluded at Detroit on the 31st day of July, 1855, fully explained to us and being satisfied therewith, do hereby assent to and ratify the same.

In witness whereof we have hereto set our hands this 27th day of June, A.D. 1856.

PI-AW-BE-DAW-SUNG,	his x mark.
TE-GOSE,	his x mark.
SAW-GAW-JEW,	his x mark.
SHAW-ANO,	his x mark.
WAW-BO-JICK,	his x mark.
RAY-BAY-NO-DIN,	his x mark.
SHAW-WAN,	his x mark.

O-ME-NO-MEE-NE,	his x mark.
PAY-NE-GOWN,	his x mark.
WAW-WE-GOWN,	his x mark.
MA-NE-DO-SCUNG,	his x mark.
NAW-WE-GE-ZHICK,	his x mark.
YAW-MENCE,	his x mark.
BAWN,	his x mark.

Signed in presence of

EBENZR WARNER,

JNO. M. JOHNSTON, *U.S. Ind. Interpreter.*

PLACIDUS ORD.

We, the undersigned chiefs and headmen of the Ottowa and Chippewa nation, having heard the foregoing amendments read and explained to us by our agent, do hereby assent to and ratify the same.

In witness whereof we have hereto affixed our signatures this 2d day of July, A. D. 1856, at Little Traverse, Mich.

WAW-SO,	his x mark.
MWAW-KE-WE-NAW,	his x mark.
NE-SAW-WAW-QUOT,	his x mark.
AW-SE-GO,	his x mark.
KE-ZHE-GO-NE,	his x mark.
KAIN-WAW-BE-KISS-SE,	his x mark.
PE-AINE,	his x mark.

PE-TAW-SE-GAY, his x mark.
KE-NE-ME-CHAW-GUN, his x mark.
MAY-TWAY-ON-DAY-GAW-SHE, his x mark.
ME-GE-SE-MONG, his x mark.
KEY-WAY-KEN-DO, his x mark.
NAY-O-GE-MAW, his x mark.

In the presence of

HENRY C. GILBERT, *Indian Agent,*
AUG. HAMLIN, *interpreter,*
JOHN F. GODFROY, "
G.T. WENDELL,
A.J. BLACKBIRD.

We, the chiefs and headmen of the Ottawa and Chippewa Indians residing near Grand Traverse Bay, having heard the foregoing amendments adopted by the Senate of the United States to the treaty of July 31, 1855, read, and the same having been fully explained to us by our agent, do hereby assent to and ratify the same.

Done at Northport on Grand Traverse Bay, Mich., this 5th day of July, A.D. 1856.

AISH-QUAY-GO-NAY-BE, his x mark.
AH-KO-SAY, his x mark.
O-NAW-MO-NEECE, his x mark.
KAY-QUA-TO-SAY. his x mark.
PETER-WAW-KA-ZOO, his x mark.

SHAW-BWAW-SUNG, his x mark.
LOUIS-MICK-SAW-BAY, his x mark.

In presence of

H.C. GILBERT, *Indian Agent,*
J.F. GODFROY, *Interpr.,*
GEO. N. SMITH,
PETER DOUGHERTY,
NORMAN BARNES.

We, the undersigned, chiefs and headmen of the Grand River bands of the Ottowa and Chippewa Indians of Michigan having heard the amendments of the Senate to the treaty of the 31st of July, 1855, read, and the same having been fully explained to us, do hereby assent to and ratify the same.

Done at Grand Rapids in the State of Michigan this 31st day of July, A.D. 1856.

CAW-BA-MO-SAY, his x mark.
SHAW-GWAW-BAW-NO, his x mark.
AISH-KE-BAW-GOSH, his x mark.
WAW-BE-GAY-KAKE, his x mark.
NE-BA-NE-SEH, his x mark.
CHING-GWOSH, his x mark.
MASH-CAW, his x mark.
GAW-GA-GAW-BWA, his x mark.
NOTE-ENO-KAY, his x mark.

NE-BAW-NAY-GE-ZHICK, his x mark.
PAY-BAW-ME, his x mark.
SHAW-BE-QUO-UNG, his x mark.
MEN-DAW-WAW-BE, his x mark.

In presence of

JOHN F. GODFROY, *U.S. Interpreter.*
WM. COBMOSY,
F.N. GONFRY.

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the fifteenth day of April, eighteen hundred and fifty-six, accept, ratify, and confirm the said treaty, with the amendments.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

Done at the city of Washington, this tenth day of
[L.S.] September, A.D. one thousand eight hundred and fifty-six, and of the Independence of the United States, the eighty-first.

By the President: FRANKLIN PIERCE.

W.L. MARCY, *Secretary of State.*

42 U.S.C. § 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for regress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(b). Attorney's fees.

In any action or proceeding tc enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 2000bb et. seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,[1] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

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[1]So in original.

U.S. Const., Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,

Plaintiff,

v

File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,

Defendants.

HON. Richard Alan Enslen

Western Dist. of MI
Filed 12/19/95

OPINION

In this action, plaintiff, the Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), claims that the defendants, Director of the Michigan Department of Natural Resources ("MDNR"), Village of Northport ("Northport"), and Leland Township ("Leland"), have violated the GTB's treaty-reserved fishing rights and federal constitutional rights to due process and the equal protection of the laws, as well as contravened prior orders of this Court by preventing members of the GTB from mooring their

commercial fishing vessels at the Northport and Leland public marinas.

Presently before the Court are cross motions for summary judgment filed by plaintiff GTB and defendants Leland and Northport.

FACTS

For centuries, Ottawas and Chippewas have fished the waters of to Great Lakes for subsistence and trade. Following the settling in the Great Lakes Area of non-Native-Americans, the Grand Traverse Ottawas and Chippewas (historical predecessors to the GTB) signed treaties with the United States in 1836 and 1855, reserving for themselves, among other rights, the right to continue commercial and subsistence fishing.

In to 1838 Treaty, the Grand Traverse Ottawas and Chippewas reserved the right to fish in their usual places, which included the waters off of Leelenau Peninsula. In to 1855 Treaty, these tribal signatories preserved reservations on the shores of Lake Michigan and Grand Traverse Bay along the grounds that they had traditionally used for lake fishing. The Northport and Leland marinas that are the subject of this litigation today are located within the boundaries of these 1855 reservations. In fact, the Leland and Northport areas historically were used by the Ottawas and Chippewas to access fishing sites in Lake Michigan and

Traverse Bay. Indeed, despite their loss of title to the land, GTB members still live adjacent to these traditional fishing grounds.

In 1979, this Court confirmed the right of the successors to the Grand Traverse Ottawas and Chippewas to commercial fishing as secured in the treaties of 1836 and 1855. See United States v. Michigan, 471 F.Supp. 192 (W.D. Mich. 1979), mod. in part, 653 F.2d 277 (1981), cert. denied, 454 U.S. 1124 (1981). On appeal, the Sixth Circuit ruled that the Native Americans' treaty-reserved rights were not unbounded: rather, the rights could be subject to the least restrictive state regulation necessary for the conservation of the Great Lakes fishery resources. United States v. State of Michigan, 653 F.2d at 279 (citing People v. LeBlanc, 399 Mich.31, 248 N.W.2d 199 (1976)).

In the fall of 1983, the GTB and two other tribes filed a motion to allocate the fishery resources between themselves and the State, consistent with their treaty rights and necessary conservation measures. One year later, the Court appointed a special master to supervise pre-trial matters and facilitate a settlement. On March 28, 1985, an Agreement for Entry of Consent Order was signed by representatives and attorneys for the parties and several amici curiae. Shortly thereafter, however, the Agreement was rejected by one of the Tribes in a referendum. The Court held a brief trial on the allocation motion; and on May 31, 1985, the Court adopted the Allocation Plan

embodied in the Agreement for Entry of Consent Order, with the plan to be in effect for 15 years.

Among other matters, the 1985 consent order divides Lake Michigan into several hundred grids, or zones, in order to allocate and track the fishery resources. The consent order reserves the three main grids surrounding Leelenau Peninsula in Lake Michigan for the exclusive commercial use of the GTB. These grids, numbered 615, 714 and 715, lie in the traditional tribal fishing waters reserved in the Treaty of 1836. Grid 715 is located in Grand Traverse Bay and encompasses relatively calm waters due to the protection of the land masses. Grids 615 and 714 encompass relatively open waters in Lake Michigan. George Duhamel, a GTB fisher, and John Robertson, a fisheries biologist and Chief of the Fisheries Division of the MDNR, both testify that fish stocks in these open waters are safely pursued only from large, non-trailerable fishing vessels.

The consent order also provides that the GTB could fish in grids located further from Leelenau Peninsula 'both for chubs, utilizing small mesh gill nets deeper than 40 fathoms, and other species, utilizing impoundment gear.....' James Mitchell, a GTB fisher, Thomas Gorenflo, a fisheries biologist and Director of the Intertribal Fisheries and Assessment Program (ITFAP), and John Robertson of the MDNR all testify that access to these chub and whitefish fisheries requires the use of large vessels that cannot be

trailered. Impoundment fishing requires trap-net boats larger than 40 feet in length; deep-water chub fishing is accomplished with large gill-net tugs.

The Northport and Leland marinas lie on opposite sides of the Leelenau Peninsula. The Northport Marina lies on the eastern shore of the peninsula and is the closest docking facility to grid 615. Leland Marina is the only facility in grid 714 along the western shore. No other marinas, public or private, exist from Northport all the way around the Leelenau Peninsula to Leland. A ten-slip tribal marina on tribal lands on the eastern shore has not yet been completed. The distance by water from existing moorage sites at Suttons Bay, Peshawbestown or Omena to commercial fishing sites in grid 714 is 20 to 30 miles. Depending upon weather conditions, a round trip could minimally take over six hours to complete. Grids located further into the Lake off of the Leelenau Peninsula are virtually inaccessible.

Beginning in mid 1993, George Duhamel began to occasionally moor his commercial fishing vessel at the public marinas in Northport and Leland. However, Northport and Leland have contracts with the State of Michigan limiting the commercial use of their marinas. The township of Leland obtained financial assistance from the State of Michigan and the federal government for constructing the marina contingent upon an agreement with the MDNR signed in May, 1967, to the effect that the

marina was to be used primarily by recreational watercraft. The agreement provides that no commercial vessel may be permitted to 'regularly' use the facilities without prior written approval from the municipality and a division of the MDNR. The facilities include 58 slips available for mooring of transient craft allowed to stay for as long as two weeks. Including slips and rafting, the marina can accommodate 120 vessels.

The Village of Northport entered into a similar agreement with the MDNR in 1988. However, not only does the Northport agreement prohibit 'regular' commercial use absent prior written approval, it also provides that 'commercial fishing vessels licensed as such shall not, under any circumstances, be permitted to use the facilities constructed hereunder for the mooring of recreational watercraft." The record before the court reflects that the Northport marina has a slippage capacity of 116 boats. The slips are categorized as follows: 41 for transient craft; 54 seasonal; five commercial; 10 broadside transient; six broadside overflow transient.

In 1991, Northport granted a 114-foot schooner, the 'Manitou', permission to moor on a regular basis. The Manitou is a commercial venture in that the ship takes passengers on excursions out onto Lake Michigan. It occupies the five commercial slips for a few days each week, and these days seldom fall on weekends. It is not clear whether the ship remains at the marina all year.

When Mr. Duhamel began mooring his vessel at the marinas he was told he could not continue to do so because of the townships' contracts with the MDNR. On July 2, 1993, when Mr. Duhamel refused to remove his vessel from a mooring slip at the Northport Marina and issued his opinion on the matter with a few choice words, he was arrested for trespassing and disturbing the peace. The following year, he was threatened with arrest when he attempted to moor his vessel at the marina in Leland. According to the GTB, other fishers have been instructed that they too cannot moor at either harbor facility. During pre-litigation discussions, the municipalities told tribal representatives that GTB fishers attempting to moor at the marinas would be subject to arrest for trespassing. The municipalities, through litigation, point-out that the Michigan Constitution grants them the power to regulate the use of public places. See Mich. Const. Art. V §§ 22, 29.

Unable to secure relief through negotiation, the GTB filed this suit claiming that the municipalities' and MDNR's policies restricting commercial use of the marinas violate the GTB's treaty reserved right to fish, frustrate prior orders of this Court (the consent order, in particular), and effect a deprivation of property without due process of law. The GTB also has lodged equal protection claims against Northport and the MDNR. The claim against Northport relates to the permission to moor granted the Manitou. The claim against the MDNR rests on the grounds that the

MDNR permits, or convinced the relevant municipalities to permit, other commercial vessels (including other Native American commercial fishing vessels) mooring access at other marinas despite similar commercial use restrictions.

The GTB seeks declaratory and injunctive relief as well as any other such relief as the Court deems appropriate. See 28 U.S.C. §§ 2201, 2202.

Standard

In reviewing a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, this Court should only consider the narrow questions of whether there are "genuine issues as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a Rule 56 motion, the Court cannot resolve issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits. Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987); In re Atlas Concrete Pipe, Inc., 668 F.2d 905, 908 (6th Cir. 1982). The crux of the motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 251-52(1986); Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1310 (6th Cir. 1989).

A motion for summary judgment requires this Court to view "inferences to be drawn from the underlying facts ... in the light most favorable to the party opposing the motion." Matsushita Electric Inc. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)), quoted in Historic Preservation Guild v. Bumley, 896 F.2d 985, 993 (6th Cir. 1989). On the other hand, the opponent has the burden to show that a "rational trier of fact [could] find for the non-

moving party [or] that there is a genuine issue for trial." Historic preservation, 896 F.2d at 993 (quoting Matsushita, 475 U.S. at 587).

DISCUSSION

With this opinion, the Court resolves the claim under the treaties, the claim to enforce the consent decree, and the equal protection claims.[1]

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[1]GTB's 18 U.S.C. § 1983 claim for deprivation of property without due process will not be resolved herein. The GTB has not briefed, and the defendants have not had an opportunity to respond to, the merits. To the extent that the GTB claims the consent decree as a source in itself of a property right, the claim cannot be made. See Green v McKaskle, 788 F.2d 1116 (5th Cir. 1986). Assuming a § 1983 claim can be made for a treaty-based property right, whether the claim is one for a procedural due process violation under the 14th amendment simpliciter, see Mertik v. Blalock, 983 F.2d 1353, 1359 (6th Cir. 1993), or for a substantive due process violation, see id. at 1367, the defendants should have an opportunity to be apprised of, and respond to, the nature of the plaintiffs claim or claims.

Assuming a statute of limitations applies to such a claim, the parties should consider Hanover Shoes Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502 n.15, 88 S. Ct. 2224 20 L.Ed.2d 1231 (1968), and National Advertising Co. v. City of Raleigh, 947 F.2d 1158, 1163 (4th Cir. 1991), cert. denied, 504 U.S. 931 (1992) and Gilbert v. City of Cambridge, 932 F.2d 51(1st Cir. 1991),

The Treaty Claim

The GTB claims that its fishers have a right under the Treaty of 1836 to use the Leland and Northport marinas for commercial fishing purposes regardless of state and municipal restrictions on such use. In particular, the GTB seeks the right to use mooring slips and other improvements. This Court has jurisdiction over the claim pursuant to 28 U.S.C. § 1362.

Statute of Limitations Defense

Leland and Northport appear to urge this Court to borrow a state statute of limitations and find time-barred the GTB's treaty-right claim of access. "There is no federal statute of limitations governing federal common law actions by Indians to enforce property rights." Oneida County, N.Y. v. Oneida Indians, 470 U.S. 226, 240, 105 S. Ct. 1245, 1254 (1985). Usually, a state statute of limitations

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cert. denied, 502 U.S. 806 (1992), and Ocean Acres Ltd. v. Dare County Bd. of Health, 707 F.2d 103, 106 (4th Cir. 1983), and cases cited therein.

In particular, the parties should advise the Court whether the commercial-use restrictions took the force of law (as in the case of an ordinance) when the municipalities adopted the agreements with the MDNR by resolution, and whether that makes any difference. See Rollingwood Homeowners v. Flint, 365 Mich. 258 (1978). To the extent the MDNR wishes to continue to rely on other similar agreements as evidence of intent, those agreements should be placed in the record.

for an analogous action is borrowed where there is no federal statute of limitations. Id. But a state statute of limitations is not borrowed where doing so would be inconsistent with federal policies. Id.

When Congress established statutes of limitation for certain claims brought by the United States on behalf of Native Americans, it specifically excluded from the limitations those actions brought by Native Americans themselves to 'establish title to, or right of possession of real or personal property.' See 28 U.S.C. § 2415(c). Access rights and profit a prendre rights are property, or interests in land. See Peaslee v. Dietrich, 365 Mich. 338, 112 N.W.2d 562 (1961) (easement); St. Helen Shooting Club v. Mogle, 234 Mich. 60, 207 N.W. 915 (1926) (profit a prendre). Treaty-reserved rights to access traditional fishing areas and catch fish are property rights protected by the United States Constitution. See Mille Lacs Band of Indians v. State of Minnesota, 853 F. Supp. 1118, 1125 (D. Minn. 1994); Muckleshot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988). Borrowing a state statute of limitations for a claim brought by Native Americans pursuant to 28 U.S.C. § 1362 for property rights established by a treaty with the United States would be inconsistent with Congressional intent. See Oneida, 470 U.S. at 241-42; Mille Lacs Band of Indians v. State of Minnesota, 853 F.

Supp. at 1125. Therefore, this Court declines to seek or borrow a limitations period for this treaty-based claim.

The Right of Access

This Court has already held that the successors to the Grand Traverse Ottawa and Chippewa have a right to fish Lake Michigan as reserved in the Treaty of 1836. See United States v. Michigan, 491 F. Supp. 192, 253-59 (W.D. Mich. 1979), mod. in part, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981). There is no dispute that the GTB is a successor to the Ottawa and Chippewa signatories of the 1836 and 1855 treaties with the United States.

The GTB's treaty-reserved right to fish includes the right to access traditional fishing grounds. United States v. Winans, 198 U.S. 371, 380 (1905); United States v. State of Oregon, 718 F.2d 299, 304 (9th Cir. 1983); Lac Courte Oreilles Band, Etc. v. Voigt, 700 F.2d 341, 352 (1983); Hall, 698 F. Supp. at 1512; United States v. Michigan, 491 F.Supp. at 253-54, 76. The treaties of 1836 and 1855 'fixe[d] in the land such easements as enable the fishing right to be exercised.' Winans, 198 U.S. at 384; United States v. State of Michigan, 471 F. Supp. at 276.

There is no material dispute that the Ottawa and Chippewa reserved a servitude, or easement of access, on the land occupied by the Leland and Northport marinas. Winans, 198 U.S. at 381, 384; United States v. State of Michigan, 471 F. Supp. at 254, 259-60, 276; McClurken

affid. ¶ 20.[2] Rather, Leland and Northport dispute the scope of that right.

Leland and Northport contend that the treaty-reserved right of access is, as a matter of law, no more than a right of ingress and egress which could never entitle the Native Americans to use improvements such as mooring

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[2] ... Where the grant of an easement such as a way does not definitely locate it... or in the case of an implied way, such as a way of necessity, a reasonable and convenient way for all parties is thereby implied in view of all the circumstances. However, ... the grantee does not have a right to go at random over any and all parts of the servient estate.... While directness of route is considered essential in locating a way of necessity, it is equally important that the party entitled to the way of necessity has a right to a convenient way, giving him reasonable access to his property.

As a general rule where, at the time of a grant of an unlocated right of way across certain land, there is in use on the land a way plainly visible and known to the parties, this way will be held to be the location of the way granted, unless it is not a reasonable and convenient way for both parties.

25 Am. Jur.2d, Easements and Licenses §§ 65, 66 (1995).

slips.[3] Cf. Winans, 198 U.S. at 381 (treaty preserved the right to cross land to reach the accustomed fishing area along a river). These defendants misconstrue the scope of the right.

Like the Supreme Court in Winans, this Court finds basic common law principles instructive. The intended scope of an easement of way defines the rights thereto. See, e.g., Thies v. Howland, 424 Mich. 282, 296 (1985); Cabal v. Kent Co. Rd. Comm., 72 Mich. App. 532, 536; 250 N.W.2d 121 (1976); United States ex. rel. Tennessee Valley Auth. v. Hughes, 408 F.2d 619, 621 (6th Cir. 1969); 25 Am. Jur. 2d Easements and Licenses §§ 72, 76 (1995). To discern the Intended scope of the GTB's right of access requires consulting the treaty which reserved the right of access and prior Court constructions of that treaty.

Native American treaties with the United States are construed liberally in favor of the Native Americans. See Antoine v. Washington, 420 U.S. 194, 95 S. Ct. 944, 43 L.Ed.2d 129 (1975); United States v. State of Michigan, 471 F. Supp. at 251-53 (citing authority); People v. LeBlanc, 399 Mich. 31, 40, 248 N.W.2d 199 (1976)

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[3]The municipalities' contention appears to be in conflict with the concession that the GTB fishers have the right to use launching ramps. Launching ramps are themselves improvements which were not in place at the time of the treaties. See 41 Am. Jur.2d Improvements § 1 (1995); Black's Law Dictionary 682 (1979 ed.).

(citation omitted). 'In the 1836 Treaty, the Ottawa and Chippewa understood that they could continue to use the land to the extent necessary to continue to live [as fishers].' United States v. State of Michigan, 471 F. Supp. at 238. The easement reserved was not merely to the lip of the Lake. The Ottawa and Chippewa retained for their successors that access which would enable their successors to meaningfully fish from traditional areas. See Winans, 198 U.S. at 381, 384; United States v. State of Michigan, 471 F. Supp. at 238. In this way, the right is analogous to an easement of access implied by reservation or implied by necessity. See United States v. State of Michigan, 471 F. Supp. at 276 (citing Winans). See also, Burdess v. United States, 553 F.Supp. 646, 650 (ED. Ark. 1982) (easements implied by reservation or necessity grant that access which enable the beneficial use and enjoyment of property).[4] The right retained was not considered onerous by the United States when the treaties were signed. See United States v. Michigan, 471 F. Supp. at 238, 279 Alter all, the non-Native American settlers were the Native Americans'

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[4]An easement implied by reservation is perhaps the more apt analogy for the matter at hand because Leland and Northport are located on tracts which we used by the Ottawas and Chippewas to access their traditional fishing areas at the time of the treaties of 1836 and 1855. See Durdess, 553 F.Supp. at 650. However, for the reasons delineated in footnote 2, the distinction is essentially moot.

primary trading partners, see id. at 256-57, and they obtained from the natives a substantial amount of land in the bargain.

Like the fishing right itself, the implied right of access is not static. The scope of the right of access must accommodate the fishers' equipment because the treaties placed no limits on fishing methods:

> [T]he means used to fish were not restricted by the Treaty of 1836.... The Indians' right to fish.... is not limited as to ... the manner of taking. The right may be exercised utilizing improvements in fishing techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish. Peterson v. Christenson, 455 F.Supp. 1095 (E.D. Wis. 1978); United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974); State v. Gumoe, 53 Wis.2d 390, 192 N.W.2d 892 (1972).

United States v. Michigan, 471 F.Supp. at 260. The GTB fishers do not lose their right to access traditional fishing areas simply because circumstances demand that they employ particular fishing gear. See id. Accord F. T. Chen, Annotation, Extent and Reasonableness of Use of Private

Way in Exercise of Easement Granted in General Terms, 3 A.L.R.3d §§ 6, 11 (1965) (citing authority).

The fact that the municipalities improved, or even created, the access to the Lake and fishery (with federal, state, and local funds) far from precludes the use of the improvement by the GTB fishers. See, e.g., Colorado Mountain Properties v. Heineman, 860 P.2d 1388 (1993); Storms v. Bergsieker, 254 Mont. 130, 135, 835 P.2d 738, 741 (1992) (Tumage, C.J., concurring)(citing Restatement of Restitution, § 106 (1939)); Dinosaur Development, Inc. v. White, 216 Cal.App. 3d 1310, 265 Cal. Rptr. 525 (1989); Wendovor Road Property Owners Assoc. v. Komicks, 28 Ohio App.3d 101, 502 N.E.2d 226 (1985) (use by dominant estate of servient estate's improvement to, or creation of, an easement without even creating right to contribution).

Accordingly, the GTB fishers have an easement of access over the Leland and Northport harbor facilities reasonably necessary for meaningful commercial fishing from traditional sites. See Winana, 198 U.S. at 381, 384; United States v. Michigan, 471 F.Supp. at 238, 253-57, 259-60, 277-78. Generally, where such a way is used by two primary parties, neither party may unreasonably interfere with the use of the other. See, e.g., Baer v. Dallas Theater Center, 330 S.W.2d 214 (Tex. Civ. App. 1959) (shared driveway). See also, Musser v. Loon Lake Shores Assoc., 384 Mich 616, 186 N.W.2d 563 (1971) (common easement to lake). Of course the reasonableness of a tribal

fishers use must be viewed with the broad and unfettered scope of the fishing right in mind. See United States v Michigan, 471 F.Supp. at 280-81. As for the use by the municipalities and the MDNR, it bears reminding that all citizens have 'the responsibility... to see that treaty-protected rights... are carried out... in a spirit which generously recognizes the full obligation... to protect the interests of a dependent people." Id. (emphasis added).

On the undisputed facts, the GTB proves its treaty-right of access. Leland and Northport assert in conclusory fashion that the GTB members may exercise their treaty right without mooring their vessels; rather, the commercial fishers can trailer their boats in and out of the marinas through the use of an access ramp. However, the unrefuted testimony of two biologists and two fishers establish that large non-trailerable vessels and certain types of gear not amenable to smaller vessels are necessary for GTB fishers to safely harvest fish from certain traditional fishing areas around the end of Leelenau Peninsula. Fishery statistics corroborate the testimony.

John Robertson, Chief of the Fisheries Division of the MDNR, testifies that it simply is not safe to fish with gill nets in the open waters of grids 714 and 615 in small, trailerable boats. The waves tend to swamp the sides of the boats. Thomas Gorenflo, of the Inter-Tribal Fisheries and Assessment Program (ITFAP) testified that, for this reason, deep water and open water fishing is generally

accomplished with large tugs that cannot be trailered in and out of a marina on a daily basis. George Duhamel, one of the GTB fishers, testified further that:

> Even if I had a trailer and truck large enough to haul a vessel this size, it would still be necessary to moor my vessel occasionally at public marinas to: tend nets set temporarily away from normal fishing areas in Grand Traverse Bay, to unload nets, off-load fish, and seek shelter from storms.

For other grids located further out in the Lake from the Leelenau Peninsula, this Court's 1985 Consent Order requires for conservation reasons that the GTB fishers use small mesh gill nets deeper than 40 fathoms when fishing for chubs, and impoundment gear when fishing for other species. See Consent Order ¶¶ 24, 25. This equipment requires the use of large vessels that cannot be trailered on a daily basis. James Mitchell, another GTB fisher testified:

> To fish for chubs... it is necessary to use a large fishing tug which cannot be trailered and launched at public access launching ramps. Likewise, to fish for whitefish or other species using impoundment gear... it is necessary to use a large trap net boat which also cannot be trailered and launched at public access sites.

Thomas Gorenflo and John Robertson corroborate James Mitchell's testimony.

Tho nearest harbors to these grids, other than Leland and Northport, would require round trips of between five and ten hours, leaving too-short a time for tending nets and retrieving fish. See Robertson affid; Duhamel affid. There simply is no material dispute of fact that GTB fishers reasonably require the ability to occasionally moor their vessels at Northport and Leland in order to: access traditional fishing areas in grids 714 and 615, fish with impoundment gear and fish for chubs, unload nets, off-load fish, and seek shelter during emergencies.

Whether or not there is some limit on the GTB's right of access based on interference with the municipalities' and MDNR's use of the improvements to the marinas, any such limit has not been exceeded here. The fishers maintain that they need to access the marinas only occasionally, for periods commensurate with what the municipalities and the MDNR consider "transient" use of up to two weeks. There are no more than a few tribal fishers in the community. The GTB's own marina will consist of only ten slips once completed. There is no evidence that all the fishers fish the same places at the same time; and, to the Court's knowledge, no more than three tribal vessels has ever attempted to moor at the same time at the same marina. The marinas each consist of over 100 slips for mooring, about half of which are reserved for transient use.

The marinas are essentially vacant for nine months out of the year; only during the summer months would the GTB fishers even have an opportunity to obtain a slip that might otherwise be occupied by a non-tribal vessel. No evidence has been offered to indicate why a tribal fisher could not be treated as any other transient vessel seeking a slip during the summer months. Nor even has it been demonstrated why an occasional tribal vessel could not be given preference during the peak season.

Nor does this Court find persuasive Leland's and Northport's assertion that the Native American fishers will begin random docking at public and private docks throughout the Great Lakes. It is well established law that an easement of way is the easement of way. See supra note 2; Moore v. White, 159 Mich. 460, 464 (1909); 25 Am.Jur.2d at § 64-70. Having selected the Leland and Northport marinas, the GTB fishers would have to establish some necessity to dock anywhere else for commercial fishing purposes.

Accordingly, the GTB is entitled to summary judgment on its claim to establish its treaty-reserved right to access improvements to the marinas such as mooring slips. This right is protected under the Supremacy Clause of the United States Constitution. See United States v. Michigan, 471 F. Supp. at 280-81.

Declaratory and injunctive relief are appropriate because the municipalities continue to assert that the

commercial-use restrictions in the contracts with the MDNR, and the power conferred on municipalities under the Michigan Constitution to regulate public places, permit the municipalities to bar GTB fishers from the marinas. See Kelley v. E.I. DuPont De Nemours and Co., 17 F.3d 836, 844-45 (6th Cir. 1994)(case or controversy). Furthermore, George Duhamel was arrested for trespassing and disturbing the peace when he moored at the Northport marina in 1992, and threatened with arrest when he attempted to moor at the Leland marina in 1993. The municipalities indicated in pre-litigation discussions with tribal representatives that tribal fishers would be arrested for trespassing if they attempted to moor.

Claim to Enforce Prior Court Orders

The GTB also seeks to enforce prior court orders; and, in particular, this Court's 1985 Consent Order in United States v. Michigan, File No. 2:73-CV-26.

This Court has the power to fashion such relief as may be necessary for compliance with a prior Court order. See, e.g., 28 U.S.C. § 1651(a); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692-96 (1979); United States v. Michigan, 508 F.Supp. 480, 487-90 (W.D. Mich. 1980). The Consent Order preserved the Native American fishing rights as recognized in the opinion reported at 471 F.Supp. 192, subject to certain conservation measures and conditions designed to facilitate the management of a common resource. See Agreement for Entry of Consent Order ¶ 7, et seq; discussion, supra.

A consent order has both contractual and judicial aspects. United States v. Michigan, 940 F.2d 143, 150 (6th Cir. 1991). "It is both a voluntary settlement agreement which could be fully effective without judicial intervention and a final judicial order placing the power and prestige of the court behind the compromise struck by the parties.' Vangaurds of Cleveland v. City of Cleveland, 23 F.3d 1013, 1017 (6th Cir. 1994) (internal quotes and ellipses omitted). See also, e.g., Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 694-95 (upholding district court's assumption of control and

allocation of fishery resources). This Court has continuing jurisdiction under the consent order; and, in any case, there is no statute of limitations on issuing process to enforce a prior order in a Native American treaty case. See Hamilton v. Nakai, 453 F.2d 152, 158 (9th Cir.), cert. denied, 406 U.S. 945 (1972).

Leland and Northport unwisely encourage a certain Balkanization of the State of Michigan by contending that, as non-parties to the prior decisions of this federal Court, they are not bound by the orders. It is well settled law that 'nonparties who interfere with the implementation of court orders establishing public rights may be enjoined' and, 'a court possessed of the res in a proceeding in rem, such as one to apportion a fishery, may enjoin those who interfere with that custody.' Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 693 n.32. The res here is the right to access the fishery resources in Lake Michigan. See United States v. Crookshanks, 441 F.Supp. 268, 270 (D. Or. 1977). Indeed, under the All-Writs Act, 28 U.S.C. § 1651, this Court has the power to issue necessary and appropriate orders relating to those 'who, though not parties to the original action...., are in a position to frustrate the implementation of a court order or the proper administration of justice.' United States v. New York Telephone Co., 434 U.S. 159, 174 (1977).

A federal district court's 'equity power is broad and flexible and the propriety of an order turns on a balancing

of individual and collective interests in the particular case.' Morgan v. McDonough, 548 F2d 28, 31(1st Cir. 1977). As previously discussed, the GTB fishers cannot participate in the court-ordered conservation programs requiring particular fishing gear or fish from grids reserved for their exclusive commercial use absent certain limited mooring access. The municipalities insist on a year-round blanket ban on use by commercial fishers. The court ordered program is quite plain and clear; the municipalities' actions impede compliance with the program.

The MDNR urges an order declaring the tribe has access only outside of the peak recreational season. The invitation is declined because the parties indicate that, once the general scope of the access right is made clear, a solution on joint use may be achieved. Nor does the Court wish to issue an order possibly infringing upon the GTB's treaty right, a right upon which the GTB has sought declaratory relief.

Similarly, the court does not agree with the GTB to the extent that the GTB appears to urge that tribal fishers need to permanently moor. Moorage has not been shown to be necessary for compliance with the Consent Order. The Court declines to issue relief for interference with the Consent Order to any greater or lesser extent than that to which the Order has been frustrated. But, any further interference by Leland or Northport with the Consent Order

will result in injunctive action and any other necessary relief.

Equal Protection Claim

The GTB also alleges claims pursuant to 18 U.S.C. § 1983 for violations of its fishers' constitutional right to the equal protection of the laws. One claim is lodged against Northport, the other against the MDNR.

The GTB contends that Northport violated the GTB's right to the equal protection of the laws by forbidding the mooring of GTB commercial fishing vessels while permitting the continuous mooring of the commercial vessel Manitou. The Manitou is a vintage 114-foot passenger sailing vessel which takes passengers on over-night excursions on Lake Michigan. The GTB has not presented direct evidence of discrimination. In order to state a prima facie equal protection claim without direct evidence, the GTB must establish that the Manitou is owned and operated by a non-Native American and that the tribal fishing vessels are "similarly situated" to the Manitou. See City of Clebume v. Clebume Living Ctr., Inc., 473 U.S. 432, 439 (1985); Kalina v. Railroad Retirement Board, 541 F.2d 1204, 1205 (6th Cir. 1976), aff'd 431 U.S. 909 (1977). See also, LRL Properties v. Portage Metropolitan Housing Authority, 55 F.3d 1097, 1111 (6th Cir. 1995); Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992).

The Court finds nothing in the record identifying the status of the owners or operators of the Manitou. Furthermore, in order to be deemed "similarly situated", the vessels at issue here must have engaged in the same conduct without differentiating or mitigating circumstances that would distinguish their different treatment. See Mitchell, 964 F.2d at 583; Kalina, 541 F.2d at 1205. Under this standard, commercial fishing vessels and commercial passenger sailing vessels cannot be deemed similarly situated. The unloading of fish and tending of nets are a different form of interference with the recreational policies than the loading and unloading of people from a vintage vessel, however less frequent or continuous. Accordingly, the GTB's motion for summary judgment will be denied, arid Northport's motion for summary judgment will be granted.

The GTB claims that the MDNR violated the equal protection clause because the MDNR permitted the mooring of some commercial fishing vessels at other Michigan marinas despite commercial-use restrictions, but failed in its efforts to persuade Northport and Leland that the commercial-use restrictions were not applicable to the GTB. The touchstone of any discrimination claim under the constitution is an intent to discriminate. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977). No inference of a discriminatory intent on the part of the MDNR may be

drawn from the recalcitrance of Northport and Leland. In any case, the commercial users permitted to moor on occasion at the other marinas include several Native American commercial fishers.

Accordingly, the GTB is not entitled to summary judgment on the GTB's equal protection claim against the MDNR. The MDNR has not moved for summary judgment, but the Court will nevertheless dismiss the claim sua sponte.

CONCLUSION

Given the broad treaty right to employ any fishing equipment not restricted for conservation reasons, barring the tribal fishers from that access required for equipment ordered under the Consent Decree contravened that court order as well as the treaty right itself. Here, to violate the one was to violate the other.

This Court declares that the GTB fishers have the right under the treaties of 1836 and 1855 to "transient" use of mooring slips and associated improvements at the Leland and Northport marinas in order to: access traditional fishing areas in grids 714 and 615, fish with impoundment gear and fish for chubs, unload nets, off-load fish, and seek shelter during emergencies. Furthermore, this Court declares that Leland, Northport and the MDNR may not interfere with this right without violating both the treaties backed by the Supremacy Clause of the United States Constitution and this

Court's 1985 Consent Order issued in United States v. Michigan, File No. 2:73-CV-26. The Court declines to issue an injunction on the parties' representations that declaratory relief will permit access issues to resolve themselves.

The GTB is not entitled to summary judgment on its civil rights claims. Northport and the MDNR are entitled to summary judgment on the equal protection claim. Neither Northport nor Leland is entitled to summary judgment on any other claim.

No rational trier of fact could conclude otherwise.

DATED in Kalamazoo, MI:
Dec. 19, 1995

/s/Richard Alan Enslen
Richard Alan Enslen
Chief Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,

Plaintiff,

v File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,

Defendants.

HON. Richard Alan Enslen

Western Dist. of MI
Filed 12/20/95

PARTIAL JUDGMENT

In accordance with the opinion entered on this date,

IT IS HEREBY ORDERED that the motion for summary judgment (dkt. # 36) filed by plaintiff Grand Traverse Band of Ottawa and Chippewa (GTB) is **GRANTED in part and DENIED in part**.

The motion is **granted** as to plaintiff GTB's treaty-based claim to establish mooring access at the Leland and Northport marinas as herein described, and as to the claim for a declaration that Leland and Northport may not bar the

tribal fishers from the access to the Leland and Northport facilities herein described without facing injunctive and any other necessary action for violating this Court's 1985 Consent Order in United States v. Michigan, 2:73-CV-26.

The motion is **denied** as to plaintiff GTB's equal protection claims against Northport and the Director, Michigan Department of Natural Resources.

IT IS FURTHER ORDERED that the GTB fishers have the right to transient use of the Leland and Northport marina facilities, including mooring slips, in order to access traditional fishing areas in grids 714 and 615, fish with impoundment gear and fish for chubs, unload nets, off-load fish, and seek shelter during emergencies.

IT IS FURTHER ORDERED that the motion for summary judgment (dkt. # 38) filed by defendants Northport and Leland is **GRANTED in part and DENIED in part**.

The motion is granted on plaintiffs equal protection claim against Northport.

The motion is denied in all other respects.

IT IS FURTHER ORDERED that defendant Northport is entitled to **JUDGMENT** on plaintiff GTB's equal protection claim.

IT IS FURTHER ORDERED that defendant Director, Michigan Department of Natural Resources is entitled to **JUDGMENT** on plaintiff GTB's equal protection claim.

IT IS FURTHER ORDERED that plaintiff GTB may file a motion on its due process claim no later than seven (7) clays from receipt of this Opinion and Order. The defendants may file a response no later than seven (7) days from receipt of any such motion. The plaintiff GTB may file a reply no later than four (4) days from receipt of any response.

DATED in Kalamazoo, MI:
Dec. 19, 1995

/s/ Richard Alan Enslen
Richard Alan Enslen
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,
Plaintiff,

v File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,
Defendants.

HON. Richard Alan Enslen

Western Dist. of MI
Filed 1/17/96

ORDER AND JUDGMENT

The matter before the Court is plaintiff the Grand Traverse Band's (GTB's) motion for entry of final Judgment, for dismissal of its 18 U.S.C. § 1983 claims of deprivation of a property right without due process of law and for an extension of time in which to file a motion seeking attorneys' fees. Defendants Leland and Northport only oppose the motion as it relates to the extension of time. Good cause has been shown for an extension of time for briefing the merits of a motion. However, defendants are entitled to have some notice sufficient to alert them that there is a claim for fees and the amount of such fees before

the deadline for appeal. See Fed. R. Civ. P.54 committee notes on 1993 amendment. Accordingly,

IT IS HEREBY ORDERED that plaintiff GTB's motion for entry of Judgment, dismissal of its due process claims and enlargement of time in which to file a motion for attorneys' fees, filed on January 3, 1996, is **GRANTED**.

IT IS FURTHER ORDERED that plaintiff GTB's 18 U.S.C. § 1983 claims are **DISMISSED**.

IT IS FURTHER ORDERED that this Court's December 19, 1995, Opinion and Order represents the final **JUDGMENT** of this matter, pursuant to Federal Rule of Civil Procedure 58.

IT IS FURTHER ORDERED that plaintiff GTB must file a motion stating whether or not it has chosen to seek attorneys' fees and costs and the amount of such fees (or a fair estimate) no later than fourteen (14) days after entry of Judgment.

IT IS FURTHER ORDERED that plaintiff GTB shall have thirty (30) days from the date of this Order for filing a supplement briefing the merits of any motion for attorneys' fees and bill of costs. Should it become necessary, the Court will extend the deadline for appeal under Federal Rule of Civil Procedure 58.

Dated in Kalamazoo, MI:
Jan. 17, 1996

/s/ Richard Alan Enslen
Richard Alan Enslen
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,
Plaintiff,

v File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,
Defendants.

HON. Richard Alan Enslen

Western Dist. of MI
Filed 7/12/95

OPINION

This matter comes before the Court on plaintiff GTB's motion for an award of attorneys fees, pursuant to 42 U.S.C. § 1988. The municipal defendants, but not the Director of the Michigan Department of Natural Resources, responded to the motion. The briefing parties have addressed several threshold issues of law and request an opportunity to file supplemental briefs.

FACTS

The facts and procedural history of this case are summarized in this Court's December 19, 1995 Opinion in this matter. For the purposes of this motion, it is important to note the following. The GTB sought commercial fishing access to recreational marinas in Northport and Leland. Northport and Leland have contracts with the Michigan Department of Natural Resources (MDNR) strictly limiting the commercial use of the marinas. The townships represented that they had the power under these contracts and under the Michigan Constitution to bar the GTB's access to the marinas. Although the GTB's complaint was less than clear, the GTB sought declaratory or injunctive relief under four theories. The complaint alleged that the defendants townships and MDNR violated the GTB's treaty right to access traditional fishing areas, violated a consent decree entered in a related action, deprived the GTB of a property right without due process of law, and violated the equal protection clause. The latter two grounds for relief were sought through 42 U.S.C. § 1983.

On cross-motions for summary judgment, the Court entered a judgment in favor of the GTB on the treaty claim and the consent decree claim. Judgment in favor of the defendants was entered on the equal protection claim. Substantial unbriefed issues of fact and law prevented entry of judgment on behalf of either party on the due process

claim. The GTB then stipulated to "dismissal' of its due process claim because it had obtained a declaration that barring GTB fishers from the recreational marinas was unlawful and any further interference would lead to injunctive relief.

The GTB now seeks an award of attorneys fees pursuant to 42 U.S.C. § 1988.

DISCUSSION

Section 1988 provides that reasonable attorney's fees may be awarded to the prevailing party "[i]n any action or proceeding to enforce [§ 1983]". While § 1983 does not itself create substantive rights, the legislative history makes clear that § 1988 was intended to apply to any action for which § 1983 provides a remedy. See Maine v. Thiboutot, 448 U.S. 1,100 S. Ct. 2502, 65 L.Ed.2d 555. "Motions for attorney's fees are collateral to the merits of an action and may be considered even after an action is terminated." Phelan v. Bell, 8 F.3d 369, 372 n.a (6th Cir. 1993).

Where multiple claims are pled, a fee award is not dependant upon the plaintiff litigating the § 1983 claim to conclusion. See Maher v. Gagne, 448 U.S. 122, 129, 100 S. Ct. 2570, 65 L.Ed.2d 653 (1980):

> The legislative history also makes clear that the fact that a plaintiff has prevailed on one of two or more alternative bases for relief

> does not prevent an award of fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success.

Smith v. Robinson, 468 U.S. 992, 1007, 104 S. Ct. 3457 (1984). His legislative intent was expressed as follows:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in [§ 1988] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the nonconstitutional claim is dispositive.... In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v.Lavine, [415 U.S 528, 94 S. Ct. 1372, 39 L.Ed.2d 577 (1974)]; United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee

claim arising out of a "common nucleus of operative fact."

H.R.Rep.No. 1558, 94th Cong., 2d Sess. at 4 n.7 (1976) (citations omitted).

Therefore, the GTB must establish that it was 1) a prevailing party, 2) that its § 1983 claims arose out of a common nucleus of operative fact and 3) that the § 1983 claims meet the substantiality test.

Claims brought explicitly under § 1983

The GTB is a prevailing party because the legal relationship between the GTB and defendants was clearly altered by this Court's prior decision on the claims not brought explicitly pursuant to § 1983. See Farrar v. Hobby, _ U.S. _, 113 S. Ct. 566, 121 L.Ed.2d 494 (1992). The treaty and consent decree claims would have resulted in the same injunctive relief sought by the due process and equal protection § 1983 claims if this Court had determined that injunctive relief was preferable despite the joint representation of all parties that declaratory relief was all that was necessary. See id. 113 S. Ct. at 572, 121 L.Ed.2d at 502 (declaratory relief enough to establish prevailing party). The due process and equal protection claims arose out of the same set of operative facts that created a case or controversy for the treaty and consent decree claims: enforcement and threatened enforcement of certain state or local rules or regulations that contravened treaty rights. Therefore, this Court finds that the GTB was a "prevailing"

party on claims arising out of a "common nucleus of operative fact" as the § 1983 claims.

The remaining question is whether the § 1983 claims are substantial. A claim is not "substantial" within the meaning of Hagans v. Lavine, where it is "essentially fictitious", "obviously frivolous,' or 'obviously without merit.' Hagans, 415 U.S. at 537 (citations omitted). 'A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Id. at 538 (citations an quotes omitted). Of course, a claim may also be insubstantial where judgment is entered against the moving party on the claim, for, in that event, the claim was clearly not related to the plaintiff's ultimate success. See Gustafson v. City of Lake Angelus, 856 F.Supp. 320 (E.D. Mich. 1993). The GTB's equal protection claim was not substantial because the Court entered judgment against the GTB on that count.

The Court finds, however, that the due process claim was 'substantial' within the meaning of Hagans v. Lavine, 415 U.S 528, 94 5. Ct. 1372, 39 L.Ed.2d 577 (1974), at least to the extent that the claim was intended to be for deprivation of procedural due process by the municipal defendants. See Mertik v. Blalock, 983 F.2d 1353, 1359 (6th Cir. 1993) (subjecting plaintiff to arrest for attempting to enter ice rink where plaintiff earned a living deprived

plaintiff of procedural, but not substantive, due process). While both the municipal defendants and the GTB moved for summary judgment on the due process count, neither party was entitled to judgment given substantial unbriefed issues of law and fact. For starters, neither party differentiated substantive from procedural due process.

The municipal defendants sought application of a statute of limitations to bar the claim. The parties did not brief whether application of a statute of limitations is appropriate for a § 1983 claim for deprivation of a treaty-based property right without due process. Courts do not borrow state statutes of limitation where to do so would violate federal policy. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465, 95 S. Ct. 1716, 44 L.Ed.2d 295 (1975). In order to state a claim for deprivation of a property right without due process of law, a plaintiff must first establish that there is a property right. See LRL Properties v. Portage Metropolitan Housing Authority, 55 F.3d 1097, 1111 (6th Cir. 1995). Because the GTB's due process claim 'involve[d] litigating the continued vitality of aboriginal title' to some extent, a statute of limitations defense may not be appropriate. See Oneida v. Oneida Indian Nation, 470 U.S. 226, 243 n.15, 84 L.Ed.2d 169, 105 S. Ct. 1245 (11985). On the other hand, because the claim is for the wrongful deprivation rather than merely for the establishment of the property right, a statute of limitations might be appropriate.

This Court further noted that, assuming a statute of limitations applied, authorities could be read to refute plaintiff's reliance on the continuing violation theory. But even for these authorities to possibly apply, the defendants had to put into evidence facts supporting any finding by this Court that the contractual agreements had the force of law when signed or ratified, as with an ordinance, see Rollingwood Homeowners v. Flint, 365 Mich. 258 (1978), and that the agreements necessarily barred tribal access.[1] The defendants did not do so. Therefore, even if the Court had held in favor of the municipal defendants on every threshold issue of law, at the bottom there were unbriefed issues of fact preventing judgment in their favor on the statute of limitations defense.

The mere fact that the GTB subsequently voluntarily withdrew or 'dismissed' the due process claim in the interests of finality does not bar the tribe from bringing a motion for payment of fees. In Brown v. Local 58, Intern'l Broth. of Elec. Workers, 76 F.3d 762, 766-67 (6th Cir. 1996), the Sixth Circuit explicitly held that a voluntary dismissal of an entire action under Fed. R. Civ. P. 41(a)

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[1]Northport's contract barred all access to recreational mooring slips by tribal commercial fishing vessels but explicitly reserved at least five slips for commercial vessels. These commercial slips continued to be available to a limited extent not briefed. Leland's contract barred only regular commercial access to recreational slips.

does not preclude a claim and award of attorney's fees even where the plaintiff failed to preserve in the dismissal motion the right to seek fees.

Here, the GTB's withdrawal or dismissal of the due process claim is properly construed as a motion to amend the pleadings under Rule 15. See Gronholz v. Sears, Roebuch & Co., 836 F.2d 515 (Fed. Cir. 1987); Management Investors v United Mine Workers, 610 F.2d 384, 394-95 (6th Cir. 1979). But logically and equitably, whether the GTB's motion is properly construed as an amendment to the pleadings by leave of court under Rule 15 or a dismissal on approval of the court under Rule 41(a)(2) is not material so long as the plaintiff has satisfied Maher v. Gagne. See 9 Charles Alan Wright and Arthur Miller, Federal Practice and Procedure § 2362, at 251-53 (2d ed. 1996) (distinction immaterial in most circumstances). See also, Concha v.London, 62 F.3d 1493 (9th Cir. 1995) (provisions in Rule 41(a) generally apply to dismissals of individual claims as well as of entire actions). Any attempt by the municipal defendants to contend that the amendment 'relates back' such that the due process claim never existed would not be well taken. While some amendments to pleadings relate back, aside from the logical difficulties with a relation back principle in this case, courts 'have generally refused to apply Rule 15(c) 'involuntarily' in this manner to penalize the party seeking the amendment.' 3 James Wm Moore, Moore's Federal

Practice ¶ 15.15[5], at 15-175 (2d ed. 1996). The GTB conditioned its amendment on the right to seek fees, the municipal defendants concurred, and forcing the parties to final judgment on a substantial claim that would add nothing to the effective relief sought would not serve the interests of justice.

Alternative theory

In the alternative, the GTB appears to contend that it is entitled to fees because the treaty right claim itself could have been expressed as a § 1983 claim. See Brief p. 7 & n.8. See also, American United for Separation of Church and State v. The School District of the City of Grand Rapids, 835 F.2d 627, 632 (6th Cir. 1987) (plaintiff need not append § 1983 label to a claim that could have been vindicated under § 1983 in order to be entitled to fees under § 1988). Compare Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 663 F. Supp. 682, 685 (W.D. Wis. 1987) (treaties are themselves "laws" within the meaning of § 1983) with United States v. State of Washington, 813 F.2d 1020 (9th Cir. 1987) (only state action in conflict with previously interpreted and "well-established" treaty right constitutes a § 1983 claim); but cf., also, Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 634 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980) (uncertainty in the law is not a basis for denying fees). Because such a § 1983 claim

would arise out of the identical set of facts as the due process claim, the GTB may recover for the work on the treaty claim whether or not it could be couched as a § 1983 claim as well as a non-fee generating treaty claim. No purpose would be served at this time by ruling that the GTB was entitled to have brought its treaty right claim directly under § 1983.[2]

Ancillary proceedings

Having determined that the GTB is entitled to fees, the next question is whether work performed in ancillary actions related to the instant matter may be included in a "reasonable" fee. The ancillary proceedings were a state criminal trespass action against one of the tribal fishers, a state civil action against the same tribal fisher seeking an injunction against mooring of his vessel in the municipal marinas, and motions for declaratory and injunctive relief filed by the GTB in a related case over which this Court has continuing jurisdiction, United States, et al. v. Michigan, et al., W.D. Mich. File No. 2:73-CV-26.

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[2]The MDNR never responded to the GTB's motion for fees. To the extent that the MDNR, or the municipalities, on further briefing wish to contest the GTB's right of recovery for work on the treaty claim, the Court will find it necessary to address the issue of the GTB's right to vindicate its fishing rights directly under § 1983.

The GTB contends that recovery may be had for work in the ancillary proceedings because it "functionally substituted" for work that would have been done in the instant case. The municipal defendants rely upon Greer v. Holt, 718 F.2d 206, 208 (6th Cir. 1983) for the proposition that none of the fees incurred by the GTB in the ancillary actions are recoverable in the instant action.[3] In Greer, the Sixth Circuit held that fees incurred pursuant to a criminal defense were not compensable in a subsequent civil action to enforce a civil rights law. Id. Greer reasoned that criminal defense work is neither pursuant to an "action or proceeding to enforce a civil rights law" within the meaning of § 1988 nor pursuant to the "same" action or proceeding, and defense counsel are required to defend the plaintiff in criminal court irrespective of their representation in the fee generating federal action. Id.

Three Supreme Court cases undermine Greer. In Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 478 U.S. 548, 559, 106 S. Ct. 3088. 92 L.Ed.2d 439 (1986), the Supreme Court clarified its holding in Webb v. Board of Ed. of Dyer County, 471 U.S. 234, 85 L.Ed.2d 233, 105 S. Ct. 1923 (1985): '[In Webb,] we noted that for the time spent pursuing optional administrative

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[3]Is not clear from the defendants' arguments whether they argue that Greer only applies to the prior criminal trespass case.

proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation.' (quoting Webb, at 243). Delaware Valley regarded § 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), which the Supreme Court found analogous to § 1988. The Supreme Court applied Webb, a § 1988 case, in holding that work performed in proceedings before the Environmental Protection Agency that were 'a portion[] of the present [judicial] action' could qualify as compensable fees under Webb. Id. at 560-61. While completion of the proceedings before the E.P.A was not a required precondition to a claim under the Clean Air Act, they were nevertheless 'crucial to the vindication of Delaware Valley's rights' in the judicial action. Id. at 561. Most of the fees at issue had been incurred pursuant to administrative work performed after the judicial adjudication of the plaintiffs' rights. See id. at 556. In so holding, the Court emphasized that the words 'action' or 'proceeding' as they appear in the Clean Air Act and § 1988 refer to administrative as well as judicial forums. Id. at 559-60. The Court took pains to note that it expressed 'no judgment on the question of whether an award of attorney's fees is appropriate in federal administrative proceedings when there is no connected court action in which fees are recoverable." Id. at 560 n. 5.

However, North Carolina Department of Transportation v. Crest Street Community Council, 479 U.S. 6, 15, 93 L.Ed.2d 188, 107 S. Ct. 336 (1986), resolved that there must be a court action for recovery of § 1988 fees under Webb. In Crest Street, the Supreme Court held that a motion for attorney's fees must be raised in the substantive judicial action brought to enforce a civil rights law. Id. at 14. The Court explained that attorney's fees may be awarded for work performed in a proceeding only when the proceeding is 'part of' or 'followed by' the lawsuit to enforce the civil rights law. Id. But the ancillary proceeding need not itself have been a proceeding to enforce the civil rights law:

> Moreover, even if the prior proceeding is not a "proceeding to enforce' one of the § 1988 civil rights laws, the "discrete portion of the work product from the administrative proceedings' that 'was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement' can be part of the attorney's fees awarded under § 1988. (Quoting Webb).

Id. at 15.

Several principles may be distilled from these Supreme Court cases. The ancillary proceeding need not itself have been an action or proceeding brought to enforce a civil rights law. See id. at 15. The ancillary proceeding

may either be 'part of or followed by' the action brought to enforce the civil rights laws, Id. at 14, or the work in the ancillary proceeding must at least meet the Webb test for work in the substantive action whether or not the ancillary proceeding precedes the substantive action. See Delaware Valley, 478 U.S. at 452. The ancillary action or proceeding may be judicial or administrative. See id. at 559-60. Indeed, the reasoning the Supreme Court gave for awarding fees for the ancillary administrative work in Delaware Valley, applies equally as well to the district court's award for work in an ancillary state court action in that case. See Delaware Valley, 478 U.S. at 561 n.1., 2.; Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 762 F.2d 272, 277 n.7 (3d Cir. 1985).

Under the Supreme Court trilogy, work in ancillary proceedings qualifies as compensable attorney's fees in the judicial 'action to enforce' to the extent that the work "was useful and of a type ordinarily necessary" to the advancement of the enforcement proceeding. See Webb, 471 U.S. at 243. Generally, the work must have "obviated the need for comparable work in" the enforcement proceeding, and 'contributed directly to its successful outcome." See Webb, 471 U.S. at 249-50 (Brennan, J., concurring.). See also, McDonald v. Armontrout, 860 F.2d 1456, 1462 (8th Cir. 1988). Other work constitutes damage. 'Application of this standard is left to the sound

discretion of the district court.' Delaware Valley, 478 U.S. at 561.

Some district courts in districts outside of the Sixth Circuit have applied Greer since Webb at least to prior criminal defense work. See, e.g., Kyreakakis v. Paternoster, 732 F.Supp. 1287 (D.N.J. 1990); McKever v. Vondollen, 681 F.Supp. 999 (N.D.N.Y. 1988). These either fail to account for the subsequent Supreme Court precedent, or fail to account for the reasoning. Other courts have awarded partial fees when the state criminal work 'functionally substituted for work that would have been necessary in the federal action.' Phelps v. Hamilton, 845 F.Supp. 1465 (D. Kan. 1994), vacated on other grounds, 76 F.3d 393 (10th Cir. 1996). See also, Perkins v. Cross, 728 F.2d 1099, 1100 (8th Cir. 1984); Cerva v. E.B.R. Enterprises, Inc., 740 F.Supp. 1099, 1104 (E.D. Pa. 1990); Fletcher v. O'Donnell, 729 F.Supp. 422, 429-30 (E.D. Pa. 1990).

This Court holds that Greer no longer applies to bar recovery for the discrete portions of attorney's fees described in Webb with regard to the GTB's ancillary federal action, United States v. Michigan. This Court has noted before that fees may be recovered for legal work pursuant to ancillary actions where the work was necessary to that party's prevailing in the fee generating action. See Knop v. Johnson, 700 F.Supp. 1457, 1465 (W.D. Mich. 1988). See also, id. (favorably citing Coleman v. Block, 589 F.Supp. 1411, 1419 (D.N.D. 1984) (granting recovery

for ancillary work crucial to success in fee generating action)). Of course, the mere fact of multiple litigation does not entitle the plaintiffs to all fees in all actions. See id. at 1466; United States v. State of Washington, 626 F.Supp. 1405, 1514 (W.D. Wash. 1985) (no fee award warranted for work in related state court proceedings where tribes refused to be a party to the ancillary state litigation and state amicus role was not essential to federal action).

The state actions must be treated somewhat differently. Section 1988 attorney's fees are available to the prevailing party, not his or her counsel. Venegas v. Mitchell, 495 U.S. 82, 87, 110 S. Ct. 1679, 109 L.Ed.2d 74 (1990); Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531, 89 L.Ed.2d 727 (1986). The GTB was neither a party nor an amicus to the state actions.[4] Cf. State of Washington, 626 F.Supp. at 1514. Rather, counsel represented one GTB fisher in both the civil and criminal state cases. The tribal fisher is not a named party or an amicus to the instant action, even though he could have been joined as a party. See Fed. R. Civ. P. 20. See also, Huertas v. East River Housing Corp., 81 F.R.D. 641, 646 (S.D.N.Y. 1979)

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[4]In this regard counsel's briefing on this motion is rather confusing. The state actions are described as lodged against the fisher, but counsel a]so states that the GTB was forced to defend its rights in state court. The Court can find a billing entry termed a motion to intervene, but no other entry that may indicate representation of the GTB.

(individual may still bring suit even where representative association is in the suit). Nor is it allege that the tribal fisher was named as a defendant in the state civil action in some form of a representative capacity. See Head v. Sec'y of Dept. of Health & Human Serv's., 26 Cl. Ct. 546, 550 (1992), aff'd 006 F.2d 318 (Fed. Cir. 1993) (describing operation of representative and individual capacity suits). The Sixth Circuit has taken notice that a lawsuit lodged against a member of a tribe is not a suit against the tribe, and any judgment would not bind the tribe even though it would "impair" a legally protected interest. See Keweenaw Bay Indian Community v. State of Michigan, 11 F.3d 1341, 1345-47 (6th Cir. 1993). Indeed, from the billing records, it appears counsel took advantage of the principle of an absent essential party, the GTB, and that party's sovereign immunity from suit, to obtain a dismissal of the state civil action against the fisher. See id.

The principle behind Webb as it applies to the plain terms of § 1988 is that ancillary work on behalf of the prevailing party may be recovered as a cost in the enforcement action. The state work, billed at it was to the state actions in which the GTB was not a party, was largely performed on behalf of someone other than the GTB.[5]

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[5]Presumably, the motion to intervene noted in footnote 4 was filed on behalf of the GTB, although the billing statement does not so specifically indicate. It would be beyond the briefing for this Court to decide at this time

Federally protected rights enforceable under § 1983 are 'personal' to the injured party. See Rose v. City of Los Angeles, 814 F.Supp. 878, 881 (C.D. Cal. 1993). So too are the § 1988 fee awards. See Evans, 475 U.S. at 730, & n. 19. The tribal fisher may have had a right to costs incurred in prior litigation necessary to subsequent vindication of his right, but the Tribe cannot rest its claim for relief on the legal interest of a third party who is not a party to this suit. See generally, Warth v. Seldin, 422 U.S. 490, 500 (1975) (standing). If there is anything left of Greer, it is that a trial Court must at least be wary of a fee award arising from identity of representation. No doubt counsel had a preexisting familiarity with the facts and applicable law which made him a desirable candidate for representing the GTB in the GTB's enforcement action; but, other than the agreement to pay the fisher's fees, counsel's experience representing the fisher was simply a reason to hire him and not a cost of the GTB's litigation.

To be sure, the defendants never sought clarification of the capacity in which the GTB sought vindication of due process rights. See Fed. R. Civ. P.9(a). The complaint indicates that the GTB sought vindication of its own right, see Mille Lacs Band of Indians v. State of Minnesota, 853 F.Supp. 1118, 1127 (D. Minn. 1994), as well as proceeded

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whether the work pursuant to that motion meets the Webb test.

in a representative capacity. See, e.g., Assiniboine & Sioux Thrives v. State of Montana, 568 F.Supp. 269, 277 (D. Mont. 1983). See generally, Huertas, 81 F.R.D. at 646. Even to the extent the suit was brought in a representative capacity where a tribe stands in the shoes of its injured member but purports to advance the common interests of the tribe, the prior work would only qualify as costs to the GTB in the sense that the GTB had agreed to pay the fisher's fees. Otherwise, the work would have been a savings to the GTB-- i.e., someone else paid counsel for the preparatory work he would have had to do for the GTB's representative suit.

There is but one case in which fees were awarded for work outside of the attorney-prevailing party relationship. See Smith v. Fussenich, 487 F.Supp. 628 (D. Corn. 1980) (fees incurred by counsel for amicus (who is not a party) awarded once counsel took-over representation of the prevailing plaintiff in the same action). The Fussinich ruling, assuming it was correctly decided, relied upon equity and the fact that no other claim for the attorney's same preparatory work could be made. That is not so here. See, e.g., Huertas, 81 F.R.D. at 646. In any case, a substantial portion of the work includes such uncompensable matters as consultation of experts in criminal law, conferences with a prosecutor and press communications. See United States v. City of Buffalo, 770 F.Supp. 108 (W.D.N.Y. 1991).

The municipal defendants have raised no particular objections to any of the billing entries. The parties have, however, asked for an opportunity for further briefing on specific billing entries once the above issues of law have been resolved. The Court will grant the parties' request for additional briefing despite the general rule that fee litigation should be kept to a minimum. The failure of the MDNR to respond to the first round of briefs plays no small part in this grant.

Whether the GTB could be entitled to bad faith fees for counsel's work on behalf of the fisher is beyond the briefing as well. See generally, 1 Mary Frances Derfner and Arthur D. Wolf, Court Awarded Attorney Fees ¶4.02 (1996).

CONCLUSION

The Court finds that the GTB is entitled to attorney's fees in this matter. Furthermore, ancillary work in representation of the GTB (which appears to be primarily United States v. Michigan at this time) that meets the Webb test may constitute a portion of a reasonable fee. In order to determine a reasonable fee, the Court will direct the GTB to file a second supplemental brief in support of its fees claim on or before ten days from receipt of this Opinion and Order. The defendants, including the MDNR, shall file responsive briefs on or before ten days following receipt of the GTB's supplemental brief.

Dated in Kalamazoo, MI:
July 12, 1996

/s/ Richard Alan Enslen
Richard Alan Enslen
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,
Plaintiff,

v File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,
Defendants.

HON. Richard Alan Enslen

Western Dist. of MI
Filed 7/12/96

PARTIAL JUDGMENT

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED that the plaintiff's motion for attorney's fees (dkt. # 82) is **GRANTED in part and DENIED in part.**

The motion is granted to the extent that the GTB is entitled to fees and that work pursuant to the ancillary federal proceeding or other ancillary work in representation of the GTB that meets the Webb test may qualify as part of a reasonable fee. The motion is denied to the extent that

the GTB seeks fees for work performed on behalf of the tribal fisher in the ancillary state actions.

IT IS FURTHER ORDERED that the GTB shall file a second supplemental brief on or before ten days from receipt of this Opinion and Order regarding the subjects of fees sought under Webb, total reasonable fee and whether the GTB is a prevailing party against the MDNR. Defendants, including the MDNR, shall file supplemental responsive briefs on or before ten days from receipt of the GTB's supplemental brief.

Dated in Kalamazoo, MI:
July 12, 1996

/s/ Richard Alan Enslen
Richard Alan Enslen
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
****

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,

Plaintiff,

v File No. 1:94:CV:707

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,

Defendants.

Hon. Richard Alan Enslen

Western Dist. of MI
Filed 7/12/96

ORDER AND AMENDED JUDGMENT

In accordance with the Court's Opinion of this date;

IT IS HEREBY ORDERED that plaintiff's motion for attorney fees (Dkt. No. 82) is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that attorney fees are awarded to plaintiff and against the Township of Leland and Village of Northport, jointly and severally, in the amount of $98,518.31. The Judgment previously entered

(Dkt. No. 72) is ordered amended to reflect this award of fees.

Dated in Kalamazoo, MI:
Oct. 4, 1996

/s/ Richard Alan Enslen
Richard Alan Enslen
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,

Plaintiff,

v File No. 1:94:CV:707

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,

Defendants.

HON. Richard Alan Enslen

Western Dist. of MI
Filed 10/4/96

OPINION

This matter is before the Court on plaintiff Grand Traverse Band of Chippewa and Ottawa Indians' ("Grand Traverse Band") motion for attorney fees pursuant to Title 42 United States Code Section 1988--which has been the subject of argument and briefing for some time. The Court now resolves several questions left unanswered in its earlier opinions. In doing so, the motion for attorney fees is granted in part and denied in part.

I.

Previously, by its Opinion of July 12, 1996, this Court determined that the plaintiff Grand Traverse Band was entitled to attorney fees against the Township of Leland and Village of Northport pursuant to 42 U.S.C. § 1988.[1] The Court's Opinion of December 19, 1995 observed that a decision of the Ninth Circuit Court of Appeals refrained from awarding fees in an Indian treaty case where the right was not "clearly established" prior to the issuance of the trial court's decision. See United States v. Washington, 813 F.2d 1020 (9th Cir. 1987). Defendants now request reconsideration of the Court's July 12, 1996 Opinion awarding fees on the ground that the due process claim

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[1]The plaintiff has not formally sought attorney fees against the Michigan Department of Natural Resources. The plaintiff has made clear in its later pleadings that its original motion for fees was only intended to request attorney fees from the municipal defendants, in part because of some assistance given by the MDNR to the plaintiff and in part because of perceived 11th Amendment problems. Since it has not timely sought these fees and has not timely requested an extension under Rule 54 to seek fees from the MDNR, it is now precluded from seeking these fees by time limits contained in Rule 54. United Industries, Inc. v. Simon-Hartley, Inc., 91 F.3d 762, 765 (5th Cir. 1996); Committee for Idaho's High Desert v. Yost, 92 F.3d 814, 824 (9th Cir. 1996); American Nat'l Fire Ins. Co. v. Kenealy, 72 F.3d 264, 271 n.4 (2nd Cir. 1995).

litigated in this case related to a treaty right which was not clearly established.

The Court now determines that this case is distinguishable from the Ninth Circuit's decision in Washington on several grounds. First, in this case, unlike Washington, the complaint contained a specific request for damages under Section 1983. See Americans United for the Separation of Church & State v. School Dist. of City of Grand Rapids, 835 F.2d 627, 630 (6th Cir. 1987). Second, and more importantly, in this case the previous case law, the treaty and the consent judgment all sufficiently established the plaintiff's right to moor at these traditional fishing areas prior to the conduct of the defendants in violation of those rights. See Opinion of December 19, 1995.[2] As explained in the Court's prior opinion, the right to moor was defined not only by the treaty, but by prior judicial determinations relating to the plaintiff's right to fish in traditional fishing grounds in the State of Michigan. Accordingly, the plaintiff here, unlike the plaintiff in Washington, has raised a substantial constitutional question

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[2]Furthermore, even if the law was unclear at the time of the alleged due process violation, the Sixth Circuit has said that a fee award would still be appropriate since the purpose of the attorney fee statute was to encourage the resolution of such unresolved legal issues. Norcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 635 (6th Cir. 1979), cert. den., 447 U.S. 911 (1980).

(its due process claim--which was voluntarily dismissed) which arises out the same nucleus of facts which entitled plaintiff to relief. As such, the plaintiff is entitled to attorney fees as a prevailing party pursuant to 42 U.S.C. § 1988. Maher v. Gagne, 448 U.S. 122, 132 (1980).

II.

This Court also previously determined that the plaintiff as a prevailing party is entitled to fees not only for the instant litigation but for such "ancillary proceedings" as are "necessary" and "useful" in vindicating the plaintiff's civil rights. Webb v. Board of Education, 471 U.S. 234 (1985); Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 478 U.S. 546, 559 (1986). The Court has previously said that the decisions in Webb and other Supreme Court case law after the holding by the Sixth Circuit Court of Appeals in Greer v. Holt, 718 F.2d 206, 208 (6th Cir. 1983) might work to broaden the class of "ancillary proceedings" for which a movant may receive attorney fees. While this is true, it is also true that neither the United States Supreme Court nor the Sixth Circuit Court of Appeals since the decision in Greer, supra, has held that in a Section 1983 action attorney fees are recoverable for representation in a prior criminal defense. Until this occurs, this Court is bound by the decision in Greer. Sixth Circuit Court of Appeals Internal Operating Procedure 22.4.1. Therefore, the Court determines that the efforts expending

in prior criminal proceedings cannot be compensated consistent with Sixth Circuit law.[3]

The next question is whether the plaintiff's attorney fees incurred in United States v. State of Michigan, 2:73 CV 26, are compensable under Webb, supra, and its progeny. Several courts of appeals have held that prior attorney fees incurred in a federal judicial proceeding--which were not previously compensated--are compensable if they were useful and necessary to success in the subsequent litigation. Gulfstream III Associates v. Gulfstream Aerospace Corp., 995 F.2d 414 (3rd Cir. 1993); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982). In this case, some of the legal work performed in the State of Michigan case aided in the subsequent action against Leland Township and the Village of Northport. However, it would be patently unfair and contrary to established law to assess these defendants for such fees since neither defendant appeared as a party in the earlier matter. See Morales v. Turman, 820 F.2d 728, 732 (5th Cir. 1987); Wilder v. Bernstein, 965 F.2d 1196, 1203 (2nd Cir. 1992). In fact, the Court informed the Village of Northport (and another related township) by letter during the course of the litigation that they were not parties to the litigation and

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[3]Additionally, the Court notes that fees generating in that criminal case, and a relating civil prosecution, did not directly concern the Grand Traverse Band--but instead related to one of its members.

would not be permitted to file pleadings in the litigation. See Letter of Court (Dkt. No. 1141, Case No. 2:73 CV 26). Since they were not then defendants, the Grand Traverse Band cannot now seek attorney fees against them in this litigation for legal services performed in the prior case.

Furthermore, it is doubtful whether the particular hours claimed by plaintiff for services in the State of Michigan case were "necessary" or "useful" to the resolution of this litigation (as those terms are explained in Webb). See Cullen v. Fleigner, 18 F.3d 96 (2nd Cir.) (stating that the determination of whether a matter is "necessary" and "useful' is within the discretion of the district court), cert. den., 115 S.Ct. 480 (U.S. 1994); Brooks v. Georgia State Board of Elections, 997 F.2d 857 (11th Cir. 1993) (same). Since the plaintiff's attorney has spent an ample amount of time in preparing his complaint and doing research in this case, this is not a case where the earlier legal work has eliminated or greatly reduced the amount of time required in this case. See Webb, 471 U.S. at 253 (J. Brennan, concurring). Therefore, the Court concludes that an award of attorney fees should not be made in this law suit for attorney services expended in the State of Michigan litigation, nor for services in any other litigation prior to the filing of this law suit.

III.

Plaintiff has computed its attorney fees and expenses for this law suit at $98,518.31. In assessing statutory attorney fees, the Court must consider the extent of plaintiff's overall success. Farrar v. Hobby, 506 U.S. 103 (1992). However, the Court is not to reduce the fees based on a simple ratio of successful versus unsuccessful claims. Phelan v. Bell, 8 F.3d 369, 374 (6th Cir. 1993). When the several claims are based on a common nucleus of facts, the Court should consider the suit successful provided that significant overall relief is obtained. Hensley v. Eckerhart, 461 U.S. 424, 435 (1983); Thurman v. Yellow Freight Systems. Inc., 90 F.3d 1160, 1169 (6th Cir. 1996). In this case, the plaintiff was successful in obtaining the desired relief based on its treaty and consent judgment claims. Accordingly, no reduction in fees because of lack of success is warranted.

In computing the fees, the Court is first required to calculate a lodestar amount based on a reasonable hourly fee times the number of hours reasonably expended. Hensley, supra; A. Hirsch & D. Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation, 19 (Federal Judicial Center 1994). Plaintiff herein claims 552.59 hours at a rate of $175/hour for a total of $96,703.25 (plus $1,815.06 for travel and copy expenses). The Court has broad discretion in determining to what extent the plaintiff is entitled to such fees. Hensley, supra at 437.

In making this fee calculation, the Court must determine a reasonable hourly rate for plaintiff's attorney for the legal work. The reasonableness of the rates billed is judged in large part by the prevailing market rates in the local community for such legal work. Blum v. Stenson, 465 U.S. 886, 895, n.11 (1984). Indeed, the Sixth Circuit Court of Appeals has recognized that a private attorney's normal billing rates "usually 'provide an efficient and fair short cut for determining the market rate.'" Hadix v. Johnson, 65 F.3d 532, 536 (6th Cir. 1995) (quoting Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 422 (3rd Cir. 1990)); see also Kelley v. Metropolitan City Board of Education, 773 F.2d 677, 683 (6th Cir. 1985) (en banc), cert. den., 474 U.S. 1083 (1986). In this case, the plaintiff's counsel charged his normal billing rate of $175 per hour. Defendants stated in their first brief that this billing rate was reasonable, but stated in their second response brief that a reasonable rate should not exceed $100 per hour. While plaintiff's attorney's billing rate exceeds the normal billing rate for "general practice" legal work in the Traverse City area, it is not excessive when considering that the legal work here relates to a specialized practice in federal and Indian law. This is especially true considering the limited number of practicing attorneys in this area and attorney William Rastetter's extensive experience in this area. Accordingly, the Court

approves plaintiff counsel's billing rate of $175 per hour as a reasonable rate in this litigation.

Next, the Court must determine the number of hours reasonably expended on behalf of plaintiff in this litigation. The Court notices that the plaintiff bears the burden of providing sufficient documentation to support the award of fees. Hensley, 681 U.S. at 437; Sheets v. Salt Lake County, 45 F.3d 1383, 1360 (10th Cir.), cert. den., 116 S.Ct. 74 (U.S. 1995). The Court has reviewed the billing statements for the period of June 3, 1994 to July 28, 1996 and has determined that these billing statements, together with the affidavits, bills of costs and legal memoranda adequately support the hours claimed by counsel. While it is true that the billing statements unfortunately lump together some services performed on the same day, it is clear from the billings and affidavits that each of the services were actually performed by counsel and that the daily times were reasonable for the combined services billed. Furthermore, it is clear from the extensive legal briefings filed in this case that the amount of time billed by plaintiff's attorney was required to present complex legal issues to the Court and to discuss those issues adequately with plaintiff's client as well as the adverse parties to the law suit. The Court need not and will not engage in any hindsight and "ex post facto" determination of exactly which hours of services expended were strictly necessary

for the result obtained. Woodbridge v. Marlene Industries Corp, 898 F.2d 1169, 1177 (8th Cir. 1990); Grant v. Martinez, 973 F.2d 96, 99 (2nd Cir. 1992), cert. den., 506 U.S. 1053 (1993). The Court determines that in light of the pleadings on record in this case the billing entries are sufficiently specific to identify the legal work performed on behalf of the plaintiff. The Court also concludes that, in light of the large demands of this litigation, that the total hours billed by attorney Rastetter (552.59 hours) in connection with this litigation were reasonable.[4]

Accordingly, the Court approves a fee award against the municipal defendants in the amount of $98,518.31.

IV.

Finally, the Court must determine whether some reduction of this fee award is appropriate so as to allocate some of the responsibility for the fee award to the State of Michigan. This is a troubling question because the statute provides no clear guidance on apportionment and the case law is not consistent. Nevertheless, the Court begins with the principle that damages under 42 U.S.C. § 1983 are typically assessed jointly and severally against joint tort feasors on the theory that each are responsible for the injury

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[4]The Court also determines that amounts billed for copying and travel expenses in the amount of $1,815.06 are reasonable and are recoverable under Section 1988 as stated in Norcross v. Board of Education of Memphis City Schools, 611 F.2d at 639.

sustained. Weeks v. Chaboudy, 984 F.2d 185, 189 (6th Cir. 1993). Although attorney fees under Section 1988 is a separate question, it is a question which relates to the responsibility of the parties for the tortious conduct as well as for the fees.

With respect to the apportionment of fees, the Court notes that it has broad authority under Section 1988 to allocate the fees between responsible defendants. Koster v. Perales, 903 F.2d 131, 139 (2nd Cir. 1990). Typically, in a Section 1983 case, fees are awarded jointly and severally under Section 1988 because each of the defendants (as joint tort feasors) are equally responsible for the burden of the litigation. See Kosters, supra; Corder v. Gates, 947 F.2d 374, 383 (9th Cir. 1991); Thomas v. Sams, 734 F.2d 185 (5th Cir. 1984), cert. den., 472 U.S. 1017 (1985); compare Dean v. Gladney, 621 F.2d 1331, 1340 (5th Cir. 1980), cert. den., 450 U.S. 983 (1981); Crosby v. Bowling, 683 F.2d 1068, 1075 (7th Cir. 1982).

In this case, the failure to make an apportionment imposes on the municipal defendants the entire costs of the attorney fees. This result, while perhaps not perfectly fair, is in keeping with the principle of joint and several liability, as expressed in Weeks, supra. Namely, an injured plaintiff should have the option of collecting his damages against any of the joint tort feasors causing the injury. This principle is properly extended in this case to the municipal defendants--who each caused the violation of fishing rights

complained of and who each caused the same legal issues to be fully litigated before this Court. As the parties are aware, the dispute here essentially arose out of commercial use restrictions for marinas in contracts between the municipalities and the Michigan Department of Natural Resources. Since each of the defendants undertook to agree to the restrictions and enforce the restrictions on the Grand Traverse Band and its tribal members, they are each equally responsible for the violation of the Grand Traverse Band's treaty rights. As such, the municipal parties should be held jointly and severally responsible for the entire amount of attorney fees generated in this litigation.

Therefore, the Court determines that plaintiff's right to attorney fees need not be apportioned or reduced in this case.

V.

Therefore, the Court determines that the plaintiff's motion for attorney fees should be granted in part and denied in part. Consistent with this opinion, the Court shall approve an award of attorney fees against the Township of Leland and Village of Northport, jointly and severally, in the amount of $98,518.31. The Judgment previously entered shall be amended to reflect this award of fees.

Dated in Kalamazoo, MI:
Oct. 4, 1996

/s/ Richard Alan Enslen
Richard Alan Enslen
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
****

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,

Plaintiff,

v File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,

Defendants.

Hon. Richard Alan Enslen

Western Dist. of MI
Filed 12/27/94

First Amended Complaint

[excerpted pages]

16. The sites of the Leland and Northport public marinas/Harbors of refuge were historical fishing encampments/village sites utilized by GTB members to access their traditional fishing grounds located in Lake Michigan prior to and during the period that the Treaties of 1836 and 1855 were negotiated.

17. The sites of the Leland and Northport public marinas/harbors of refuge are located within the reservation

set aside for Plaintiff and its members in Article I, clause Fifth of the Treaty of Detroit executed July 31, 1855 (11 Stat. 691).

18. GTB members have a treaty-reserved right to utilize the Leland and Northport public marinas/harbors of refuge to gain access to traditional fishing grounds and mooring rights necessary to harvest fish.

19. On numerous occasions during the past several years Plaintiff's representatives informed Defendants and/or their representatives of the necessity for Plaintiff's licensed commercial fishers to utilize the Leland and Northport public marinas/harbors of refuge (including overnight mooring of fishing vessels) in order to gain access to traditional fishing grounds; these occasions included: March 19, 1992 meeting, confirmed by MDNR Interoffice Communication dated April 6, 1992; February 19, 1993 letter to Defendant MDNR Director's representative; May 13, 1993 letter to Defendant MDNR Director's representative; June 3, 1993 letter to Defendant MDNR Director's representative; July 8, 1993 and subsequent pleadings filed in File No. M26-73; meetings of the Executive Council composed of the parties to File No. M26-73 held January 11, April 12 and June 14, 1994 and related correspondence; and a meeting in Leland, Michigan on June 20, 1994.

26. Plaintiff and its members licensed by the Tribe to fish commercially are being deprived or fishing

rights guaranteed by the Treaty of 1836 declared in the May 7, 1979 declaratory judgment and subsequent orders entered in File No. M26-73 by enforcement of the provision prohibiting commercial use contained in paragraph 5 of the May 8, 1967 agreement with Leland Township and paragraph 8 of the December 1, 1988 agreement with the Village of Northport.

27. Plaintiff and its members licensed to fish commercially by the Tribe are being deprived of their rights to due process and equal protection of the laws by enforcement of the provision prohibiting commercial use contained in paragraph 5 of the May 8, 1967 agreement with Leland Township and paragraph 8 of the December 1, 1988 agreement with the Village of Northport.

WHEREFORE, Plaintiff prays this honorable Court to:

A. Accept jurisdiction over this matter;

B. Advance Plaintiff's request for declaratory relief on this Court's calendar an authorized by Rule 57, Fed.R.Civ.P.;

C. After conducting an evidentiary hearing or otherwise adopting findings of fact and conclusions of law, issue a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring that the provision contained in paragraph 5 of the May 8, 1967 agreement between Leland-Township and the Michigan Department of Natural Resources and in paragraph 8 of the December 1, 1988 agreement between

the Village of Northport and the Michigan Department of Natural Resources prohibiting use of the Leland and Northport public marinas/harbors of refuge by commercial fishing vessels is not enforceable against licensed GTB....

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
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GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,
Plaintiff,

v File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,
Defendants. Hon. Richard Alan Enslen

Western Dist. of MI
Filed 4/17/95

Brief

[excerpted pages]

marinas because no other users are present.[5] (For much of the year there is virtually no use of the marinas, and the

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[5]Although this is not to concede that the presence of tribal fishing vessels is disruptive even during the peak recreational boating season. The GTB Tribal Council has enacted special regulations which assure that trial fishing vessels do not interfere with other users, *see* Exhibits 1 and 2; *see also* Affidavits of George Bennett, paragraph 5 at page 2, and George Arthur Duhamel, paragraph 17 at pages 6-7.

mooring slips are fully occupied only during a seven-week period between early July and late August.)

I. Statement of Facts

As summarized by the parties in the Joint Status Report signed by their attorneys on February 8, 1995:

> Statement of the Case: The case involves:
>
> Plaintiff's complaint contends that among the treaty—guaranteed fishing rights reserved by Plaintiff and the other tribal signatories to the Treaty of 1836 (7 Stat. 491) is the right of access to traditional fishing grounds arid that this right includes mooring rights necessary to harvest fish; and therefore the prohibition on commercial use contained in the agreements governing public marina/harbors of refuge between MDNR and the municipal government Defendants is not enforceable against Plaintiff Tribe's members exercising commercial fishing rights reserved by treaty with the United States by virtue of the supremacy clause (Art. XI, cl. 2) of the United States Constitution. While Plaintiff Tribe's members are permitted by the municipalities to utilize the public launch ramps at these marinas, the commercial use provisions in

the agreements with the MDNR prevent Plaintiff Tribe's members from mooring their commercial fishing vessels at the marinas.

At issue in this litigation are the public marina/harbors of refuge located at Leland and Northport (Leelanau County) which are owned and operated by Leland Township and the Village of Northport. According to the municipal defendants' answers to interrogatories, the Leland marina has 58 slips available for mooring and can accommodate 120 vessels (including slips and rafting) during periods of peak use, and the Northport marina has 100 mooring slips and can accommodate an additional 16-18 vessels on breakwalls during periods of peak use.

4. Construction of the Leland marina was funded primarily with federal and state financial contributions.

Answer: Admitted.

5. The total construction costs of the Leland public marina/harbor of refuge amounted to $2,054,124.00, and each government contributed the following portions: federal = $1,271,052.00, state = $768,072.00, and local municipality = $15,000.00.

Answer: Admitted.

6. Construction of the Northport marina was substantially funded with federal and state financial contributions.

Answer: Admitted.

7. The total construction costs of the Northport public marina/harbor of refuge amounted to $2,061,320.00, and each government contributed the following portions: federal = $405,125.00, state = $1,066,892.00, and local municipality = $589,303.00.

Answer: Admitted.

Answers to paragraphs 4-7 at pages 2-3 of Defendant's Answers To Requests For Admission, dated April 13, 1995 (Exhibit 17). The basic question to be decided by this Court is whether GTB's commercial fishing vessels may moor at these public facilities similar to other transient boaters. Although within the past year the municipal defendants informally have acknowledged that they no longer contest limited use of their facilities (utilization of launch ramps and as harbor of refuge), in previous years GTB understood that its members risked arrest even if their commercial fishing vessels only used the ramps to trailer their small boats in and out of the water. *See* Affidavit of Jack Chambers, paragraph 5 at page 2; *see also* Exhibits 4 and 5.

During the two decades since treaty-reserved commercial fishing rights were reaffirmed by the state[6] and federal[7] courts, a crucial obstacle to fulfillment of the treaty—guaranteed fishing rights has been the lack of access to productive fishing grounds. There are no other access sites in the area between Leland and Northport (nor anywhere south of Leland until Frankfort).[8] Without an ability to moor fishing vessels at the Leland and Northport public marinas, treaty-reserved fishing rights declared by this Court in *United States v. Michigan* litigation on May 7, 1979 and opportunities assured by this Court's May 31, 1985 Order (File No. M26-73) cannot be fulfilled. *See* Affidavits of Thomas Gorenflo, paragraph 6 at pages 2-3, James Mitchell, paragraph 4-7 at pages 2-3, and George Arthur Duhamel, paragraph 15 at page 6.

---

[6]*People v. Jondreau*, 384 Mich. 539, 185 N.W. 2d 375 (1971); and *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976).

[7]*United States v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979); *aff'd.* 653 F.2d 277 (6th Cir. 1981); *cert. denied* 454 U.S. 1124, 102 S.Ct. 971 (1981).

[8]*See* Affidavits of George Arthur Duhamel, paragraph 16 at page 6, and James Mitchell, paragraph 5 at page 2.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
****

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,

Plaintiff,

v File No. 1:94:CV:707

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,

Defendants.

Hon. Richard Alan Enslen

Western Dist. of MI
Filed 4/17/95

Brief

[excerpted pages]

Pursuant to these agreements and its statutory and/or common law right and sovereignty as a municipality and riparian owner, Leland Township has prohibited the mooring of commercial vessels within its marina. As with Northport, however, all vessels, including the GTB's commercial fishing vessels, may utilize the access ramp at the Leland marina free of charge.

C. The Propose GTB Marina.

The GTB owns approximately 1,000 feet of shoreline south of Northport Bay. The GTB is in the

process of obtaining the necessary permits to construct a private GTB marina at this site in the near future.

D. The Precipitating Event.

This case arises out of the actions of one individual member of the GTB, George Duhamel ("Duhamel").[1] Duhamel is a member of the GTB and a commercial fisherman licensed by the GTB. On July 4, 1993, when the Northport marina was already over capacity, Mr. Duhamel entered the marina with his 28—foot commercial fishing tug. Duhamel had no interest in the launching ramp but instead stated that he had engine trouble. Village officials offered to locate a mechanic to have Mr. Duhamel's boat fixed, without charge to Duhamel. Duhamel, however, refused to allow anyone to work on his boat and he would not work on the boat himself. Instead, he simply stayed on his boat playing loud music and voicing obscenities within listening distance of women

[1]Duhamel, individually, owns approximately 66 feet of shoreline property.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
****

GRAND TRAVERSE BAND OF CHIPPEWA AND OTTAWA INDIANS,
Plaintiff,

v File No. 1:94:CV:7O7

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; and VILLAGE OF NORTHPORT,
Defendants.

Hon. Richard Alan Enslen

Western Dist. of MI
Filed 4/17/95

DISCOVERY MATERIALS

[excerpted pages]

(e) Letter from GTB's undersigned attorney dated May 13, 1993 to Mr. Nelson which stated, in pertinent part:

> The second category of access issues was addressed in my letter to you and John Schrouder dated February 19, 1993 (which enclosed a copy of your memo to John dated April 6, 1992 concerning the Grand Traverse Band's access needs). Have the local

governmental units responsible for the Northport and Leland marinas been contacted? Regardless of the resolution of the access issues regarding the continuation of the small-boat impoundment project, the Conservation Committee is adamant that tribal fishers be able to utilize these public marinas.

(f) Letter from GTB's undersigned attorney dated June 3, 1993 to Mr. Nelson.

(g) Letter from Faith A. McGruther, Executive Director, Chippewa-Ottawa Treaty Fishery Management Authority, dated April 18, 1994, to John Robertson, MDNR Fisheries Division Chief, which referenced 'previous negotiations on access site with no success' regarding Leland and Northport marinas.

Apparently the municipal defendants no longer contest the right of GTB-licensed fishers to utilize the access/launching ramps, but this has never been stated in writing to the Tribe. Nonetheless, several years ago tribal members understood that they risked arrest by even using the launching ramps.

2. Please admit that neither Plaintiff nor any of its members have ownership rights in the property occupied by the Leland or Northport marinas.

ANSWER: Plaintiff denies this request because, upon information and belief, it is possible that historic land

claims could be asserted on behalf of the Tribe and/or descendants of GTB members who received allotments pursuant to the Treaty of Detroit executed July 31, 1855 (11 Stat - 621), since both marinas are located within GTB's reservation set aside in Article I, clause Fifth of the 1855 Treaty. Nonetheless, plaintiff agrees that for purposes of this litigation neither GTB nor its members is asserting any ownership rights in the property occupied by the Leland or Northport marinas, other than the right to utilize these public facilities notwithstanding the commercial use restrictions asserted by the municipal defendants.

3. Please admit that only one of Plaintiff's members, George Duhamel, has attempted to moor his commercial fishing vessel at the Leland and/or Northport marinas.

ANSWER: Plaintiff denies this request. Other GTB fishers occasionally have moored their vessels at the Northport marina, and all GTB-licensed commercial fishers have been deterred from using the Leland and Northport marinas by threat of arrest.

4. Please admit that only one of Plaintiff's members, George Duhamel, has been arrested and charged with a criminal offense while his vessel was moored at the Northport public marina.

ANSWER: Plaintiff admits this request.

5. Please admit that George Duhamel's arrest was not based solely upon the fact that his at was moored at the Northport public marina.

ANSWER: Plaintiff denies this request. (This denial is based upon interviews personally conducted by Plaintiff's undersigned attorney with many witnesses to the July 2, 1993 incident resulting in Mr. Duhamel's arrest.)

6. Please admit that although requested to do so by Plaintiff, the MDNR Director's Agency refused to relieve Leland Township and the Village of Northport from the provisions prohibiting commercial use. . .

FILED
OCT 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-485

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

TOWNSHIP OF LELAND and VILLAGE OF NORTHPORT,
Petitioners,

v.

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,

and

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT INDIAN TRIBE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Sixth Circuit Case No. 96-1168

Whether compelling reasons exist to grant writ of certiorari where the court of appeals' decision neither conflicts with another decision nor involves an important question of federal law.

Whether review by the Court is appropriate where the asserted basis involves legal conclusions not made by the district court which are premised upon factual assertions not contained in the record.

Sixth Circuit Case No. 96-2396

Whether the attorney's fees award affirmed below was premised upon an alternate basis consistent with the Court's decisions.

PARTIES TO THE PROCEEDING

The petition identifies the parties to the first proceeding below (Sixth Circuit No. 96-1168) as the parties to this proceeding: petitioners Leland Township and the Village of Northport (defendants/appellants below) and respondent Grand Traverse Band of Ottawa and Chippewa Indians (plaintiff/appellee below). However, the petition fails to designate the Director of the Michigan Department of Natural Resources as also being a respondent in this proceeding. According to Rule 12.6 of the Rules of this Court, the Director of the Michigan Department of Natural Resources is a party to this proceeding due to being a party (defendant/appellee) to the second proceeding below (Sixth Circuit No. 96-2396), *see* Pet. 1, 20-28 and Appendix B (especially B-16 thru B-18).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT OF CERTIORARI	8
I. SIXTH CIRCUIT CASE NO. 96-1168	8
A. The Petition Misrepresents The Decision Below	8
B. The Questions Presented Were Not Decided Below	11
C. Conclusion	13
II. SIXTH CIRCUIT CASE NO. 96-2368	14
A. Attorney's Fees Award Was Premised Upon An Alternate Basis Consistent With The Court's Decisions	14
B. GTB Is Prevailing Party With Respect To Unaddressed § 1983 Claim Premised On Fourteenth Amendment Due Process And Liberty Interests	15
1. Deprivation of liberty interest	16
2. Deprivation of property right	17
3. Non-fee claims reasonably related to unaddressed § 1983 claim	18
C. GTB Also Could Be Considered Prevailing Party Under 42 U.S.C. § 1988 With Respect To The Claim Arising Under The Treaty Of 1836	19
CONCLUSION (Sixth Circuit Case Nos. 96-1168 and 96-2396)	20

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Liberty Lobby, 477 U.S. 242 (1986)	11
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	11
Farrar v. Hobby, 506 U.S. 103 (1992)	18
Greene v. McElroy, 360 U.S. 474 (1959)	17
Hagans v. Lavine, 415 U.S. 528 (1974)	18
Hensley v. Eckerhart, 461 U.S. 424 (1983)	18
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	18
Maher v. Gagne, 448 U.S. 122 (1980)	15, 19
Matsushita Electronic Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)	11
Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968)	18
Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1988)	8, 18
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	17
Seufert Brothers Company v. United States, 249 U.S. 194 (1919)	8
Singleton v. Wulff, 428 U.S. 106 (1976)	13
Smith v. Robinson, 468 U.S. 992 (1984)	16, 18
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	19
United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981)	13, 19
United States v. Michigan, 653 F.2d 277 (6th Cir. 1981)	8, 16
United States v. Michigan, 712 F.2d 242 (6th Cir. 1983)	8
United States v. Oregon, 718 F.2d 299 (9th Cir. 1983)	8
United States v. Washington, 935 F.2d 1059 (9th Cir. 1991)	14, 19
United States v. Winans, 198 U.S. 371 (1905)	8, 13, 20
Washington v. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	7, 9
Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983)	17

TABLE OF AUTHORITIES—Continued

CONSTITUTION — Page

Article VI, Clause 2 7
Fourteenth Amendment 15, 16, 18

STATUTES

28 U.S.C. § 1343(a)(3) 15, 19
42 U.S.C. § 1983 ..... 15, 19, 20
42 U.S.C. § 1988 ..... 15, 18

TREATIES

Treaty with the Ottawa and Chippewa, March 28, 1836, 7 Stat. 491 (1836) 5, 19
Treaty with the Ottawa and Chippewa, July 31, 1855, 11 Stat. 621 (1855) 2, 5, 12, 13

RULES

Supreme Court Rule 10 8
Supreme Court Rule 10(a) 8
Supreme Court Rule 10(c) 9
Supreme Court Rule 12.6 ii
FED. R. C.V. P. 56(c) 5
FED. R. CIV. P. 56(e) 5, 11
FED. R. CIV. P. 56(f) 5, 11

OTHER AUTHORITIES

10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2739 (2nd ed. 1983) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-485

TOWNSHIP OF LELAND and VILLAGE OF NORTHPORT,
Petitioners,

v.

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,

and

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT INDIAN TRIBE'S BRIEF IN OPPOSITION

The respondent Grand Traverse Band of Ottawa and Chippewa Indians (GTB or Tribe) respectfully requests the Court to deny the petition for writ of certiorari filed by the municipal defendants Leland Township and the Village of Northport (Municipalities) seeking review of the Sixth Circuit's decisions in this case. The opinion (Pet. App. A-1 thru A-24) affirming the district court's declaratory judgment is reported at 141 F.3d 635 (6th Cir. 1998); the opinion (Pet. App. B-1 thru B-20)

affirming the district court's award of attorney's fees is not published.

STATEMENT OF THE CASE

The Municipalities' statement overlooks the fundamental fact that the original defendant, the Director of the Michigan Department of Natural Resources (MDNR),[1] proposed the compromise implemented by the district court's partial summary judgment which was affirmed by the court of appeals. Instead of requesting a declaratory judgment against the MDNR regulation prohibiting *permanent* mooring by commercial fishing vessels at the Municipalities' public marinas/harbors of refuge, the Tribe only sought to establish that tribal fishing vessels may utilize designated transient mooring[2] slips on the same terms and conditions as all other transient boats on the Great Lakes.

This litigation involves public marinas/harbors of refuge at Leland and Northport in Leelanau County, Michigan, which are within GTB's reservation[3] described in Article I, clause Fifth of the July 31, 1855 Treaty with the

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1 "The Director of the Michigan Department of Natural Resources ('MDNR') was also a named Defendant in the suit. Significantly, however, MDNR does not appeal the judgment." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 141 F.3d 635, 637 n.1 (6th Cir. 1998) (Pet. App. A-2).

2 The MDNR Director's brief filed July 31, 1995 with the district court noted that the term "mooring" is synonymous with "docking" within the context of this litigation. (R. 62 at 3 [JA:307]). Mooring slips are the areas between the docks within the public marinas. [Note that "JA" (joint appendix) references the record in 6th Cir. Case No. 96-1168 while "Apx." references the record in 6th Cir. Case No. 96-2396, due to a rule change prior to briefs being submitted in the second appeal.]

3 "The Northport and Leland marinas that are the subject of this litigation today are located within the boundaries of these 1855 reservations." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 284 (W.D. Mich. 1995) (Pet. App. E1-2).

Ottawa and Chippewa, 11 Stat. 621. These marinas, owned and operated by the Municipalities pursuant to agreements with the MDNR, were funded primarily with federal and state grants earmarked for construction of harbors of refuge and transient mooring on the Great Lakes.[4] The transient mooring slips operate on a first-come, first-serve basis. Once a transient vessel is registered at these public marinas, it may stay for a duration of fourteen days before being required to leave.[5] For much of the year, these facilities are virtually empty.[6] Even during June and September, less than half the available mooring slips are utilized by transient boaters.[7] To minimize the impact upon these public marinas, GTB's Tribal

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[4] The Leland marina has 58 slips available for mooring by transient boaters and can accommodate 120 vessels (including slips and rafting) during periods of peak use, and the Northport marina has 100 mooring slips and can accommodate an additional 16-18 vessels on breakwalls during periods of peak use. The total construction costs of the Leland public marina/harbor of refuge amounted to $2,054,124.00, and each government contributed the following portions: federal=$1,271,052.00, state=$768,072.00, and local municipality=$15,000.00. The total construction costs of the Northport public marina/harbor of refuge amounted to $2,061,320.00, and each government contributed the following portions: federal=$405,125.00, state=$1,066,892.00, and local municipality=$589,303.00. R.36: Exhibit 17 submitted with GTB's summary judgment motion filed 4/17/95 (DNR Director's answer to GTB's requests for admission paragraphs 4-7 at pages 2-3 [JA:163-64]).

[5] *See, e.g.*, the rules governing the G. Marsten Dame (Northport) marina. R.52: Exhibit 22 submitted with GTB's reply brief filed 6/2/95 [JA:304].

[6] R.36: Affidavit George Arthur Duhamel (paragraph 14 at page 6) submitted with GTB's summary judgment motion filed 4/17/95 [JA:134], and R.62: Affidavit of John Robertson (paragraph 10 at pages 6-7) submitted with the MDNR Director's brief filed 7/31/95 [JA:369-70].

[7] *See, e.g.*, pages 110-18 (and five pages attached as Plaintiff's Exhibit 1) of the transcript of Gary Bardenhagen's deposition taken April 19, 1995 (R.52: Exhibit 21 submitted with GTB's reply brief filed 6/2/95 [JA:291-303]).

Council enacted special regulations governing use by tribal fishers which address all of the concerns expressed in 1993-1994 by local officials during meetings with GTB representatives as well as the issues raised in their state [8] and federal court pleadings.[9] These regulations even permit the harbor masters to deny GTB fishers the use of mooring slips during periods of peak use in July and August.[10]

The declaratory judgment [11] affirmed below is limited to the specific fact situation of the Leland and Northport sites which is not duplicated anywhere else along the Great Lakes. "The land and water areas upon which the Leland and Northport marinas now rest, historically, were used by the Ottawas and Chippewas to access fishing sites in Lake Michigan and Traverse Bay." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources,* 141 F.3d 635, 637 (6th Cir. 1998) (Pet. App. A-3 thru A-4) (footnote omitted). This finding of fact, and related finding that Leland and Northport are within the Tribe's

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[8] On July 8, 1993, the Village of Northport commenced a civil litigation seeking an injunction against the GTB fisher who previously had been charged with criminal trespass by the village when he moored his fishing vessel at the Northport public marina on July 2, 1993 [State of Michigan (Leelanau County) 13th Judicial Circuit Court Case No. 93-3301-CZ]. This case was dismissed the following year. *See* R.36: Affidavit of George Arthur Duhamel (paragraph 7 at page 3) submitted with GTB's summary judgment motion filed 4/17/95 [JA:131].

[9] R.36: Exhibits 1-2 submitted with GTB's summary judgment motion filed 4/17/95 [JA:139-40]; *see id.* R.36: Affidavits of George Bennett (paragraph 5 at page 2) [JA:116] and George Arthur Duhamel (paragraph 17 at pages 6-7) [JA:134-35].

[10] *Id.*, R.36: Exhibit 2 (rule 5) [JA:140].

[11] "IT IS FURTHER ORDERED that the GTB fishers have the right to transient use of the Leland and Northport marina facilities, including mooring slips, . . ." 971 F. Supp. at 284 (Pet. App. E2-2).

reservation,[12] was supported by an ethnohistorian's affidavit testimony (with attached documents) establishing that the precise locations of the present-day Leland and Northport public marinas were utilized by the Tribe at the time of the 1836 and 1855 Treaties to access traditional fishing grounds.[13] 141 F.3d at 637 and n.2 (Pet. App. A-3 thru A-4); *see also Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 285 & 288-89 (W.D. Mich. 1995) (Pet. App. E1-2 thru E1-3 & E1-13 thru E1-15).

After GTB met the FED.R.CIV.P. 56(c) burden by establishing (with affidavit testimony and supporting documents) these facts regarding the Leland and Northport marinas including GTB's historic utilization as well as specific reservation of these sites in the 1855 Treaty, the Municipalities failed to satisfy the corresponding shifting burden under FED.R.CIV.P. 56(e) or the requirement of FED.R.CIV.P. 56(f) "to justify the party's opposition" by presenting affidavit(s) stating the reasons why it was not possible to satisfy the Rule 56(e) shifting burden. The Municipalities similarly failed to refute evidence submitted by the MDNR Director establishing both that transient mooring did not violate the MDNR's contractual agree-

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[12] *See* footnote 3, *supra* at page 2. "(T)he 1836 treaty reserved for the Ottawas and Chippewas the right to fish in their usual places, which included the waters off the Leelanau Peninsula. Treaty of Washington, 7 Stat. 491. The 1855 treaty preserved a reservation located adjacent to these traditional fishing grounds. Treaty of Detroit, 11 Stat. 621." 141 F.3d at 637 (Pet. App. A-3).

[13] "Although the municipalities baldly assert that GTB's access to traditional fishing grounds was located adjacent to their marinas, they provide absolutely no evidence to substantiate this claim and do not directly challenge the district court's conclusion on appeal." 141 F.3d at 637 n.2 (Pet. App. A-4).

ments and also that it was necessary to effectuate fishing opportunities assured in the 1985 consent decree.[14]

The only issue in contention is whether tribal fishing vessels may utilize these public marinas/harbors of refuge for transient mooring at slips designated for public use.[15] Resolution of this issue required the district court to determine whether the Municipalities may enforce a non-commercial policy against tribal fishing vessels exercising treaty-reserved fishing rights. The Municipalities' primary argument to the district court relied upon the "non-commercial" language in their agreements[16] with the MDNR as the justification for prohibiting GTB's commercial fishing vessels.[17] But the record contains unrefuted evidence

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[14] 141 F.3d at 640 (Pet. App. A-11 thru A-13); *see* 971 F. Supp. at 285-86 & 290-91 (Pet. App. E1-3 thru E1-6 & E1-19 thru E1-21).

[15] Although within the context of this litigation the Municipalities acknowledge (*see* Pet. 4) that they no longer contest GTB's limited use of their facilities (utilization of launch ramps and as harbors or refuge), previously GTB members risked arrest even if their commercial fishing vessels only used the launching ramps to trailer small boats in and out of the water. R.36: Exhibits 4 & 5 [JA:142-44], and Affidavit of Jack Chambers (paragraph 5 at page 2) submitted with GTB's summary judgment motion filed 4/17/95 [JA:113].

[16] The Municipalities' agreements with the MDNR contain the following identical language: "It is (further) agreed (. . .) that commercial vessels of any type, including but not limited to, charter fishing vessels, shall not be permitted *to regularly use* any of the said facilities without first securing the approval in writing of both the (Township/Village) and the (Commission/Department)." (Emphasis added.) R.38: Exhibits A and B submitted with the Municipalities' motion for dismissal/summary judgment filed 4/17/95 [JA:207 & 215]. *See* 141 F.3d at 638 n.5 (Pet. App. A-7).

[17] Subsequently the Municipalities also contended that the Michigan Constitution vested them with authority to regulate their public marinas; but the Municipalities did not respond to the MDNR Director's argument that as instrumentalities of the State, the Municipalities are required to comply with the district court's consent decree in the *United States v. Michigan* litigation. *See*

that the MDNR considers this contractual provision not to be applicable to the occasional, transient use by tribal fishing vessels at issue in this litigation.[18] Moreover, no factual evidence was presented showing any detrimental result from occasional overnight mooring by tribal fishing vessels at the public marinas.[19] The court of appeals properly concluded that the Municipalities' reliance upon their agreements with the MDNR is incorrect:

> First, under the Supremacy Clause of the United States Constitution, treaties override any conflicting state or local laws. U.S. Const., art. VI. Cl. 2; *ac-*

R.62: MDNR Director's brief filed 7/31/95, at 13-16 [JA:317-20]. *Cf. Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979).

[18] The MDNR Director's answer to Municipalities' interrogatory number 6 stated, at page 5:

> Further, paragraph 5 of the May 8, 1967 agreement between the MDNR and Leland Township and paragraph 8 of the December 1, 1988 agreement between the MDNR and the Village of Northport contain identical language prohibiting "regular use" of commercial vessels absent "approval in writing" by the signatories *but clearly contemplates permission of non-regular use by commercial vessels without approval in writing.*
>
> Further, the MDNR has consistently taken the position that the access requested by the Plaintiff was reasonable under the specific facts of the situation; that Plaintiff's request would not undermine the purpose of the agreements; and, that those agreements should not be used as a basis to deny access to the Plaintiffs under the facts of this case.

R.36: Exhibit 18 submitted with GTB's summary motion filed 4/17/95 [JA:173] (emphasis added). *See also* R.62: O.J. Scherschlight deposition transcript at pages 15-16, 35 and 41-42 [JA: 386-87, 406 & 412-13] and Affidavit of John Robertson (paragraphs 3, 9-12 & 14 at pages 2-3 & 5-8) submitted with the MDNR Director's brief filed 7/31/95 [JA:365-66 & 368-71].

[19] "(T)he municipalities have not indicated how GTB would interfere with the use of this property that is already opened for use by the public at large." 141 F.3d at 641 (Pet. App. A-16); *see* 971 F. Supp. at 282 (Pet. App. E1-22).

> *cord United States v. Michigan*, 471 F. Supp. at 281.[20] Second, as noted, MDNR clearly indicates that it believes that GTB is entitled to access to the marina and that the agreements provide no interference with that right. * * * Significantly, GTB does not request any more mooring rights than those that the marinas already allow. Thus, there are simply no reasons why such use would be prohibited. Accordingly, we hold that the 1836 and 1855 treaties provided for an easement of access to reach traditional fishing grounds which includes the right of transient mooring in the municipalities' marinas.

141 F.3d at 641 (Pet. App. A-16).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. SIXTH CIRCUIT CASE NO. 96-1168

A. The Petition Misrepresents The Decision Below

Rule 10 of the Rules of this Court provides that a petition for writ of certiorari will be granted only for compelling reasons, including when the decision of the court of appeals is in conflict with the decision of another circuit, or involves "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The first category [Rule 10(a)] is lacking.[21] The Municipali-

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[20] *See also United States v. Michigan*, 653 F.2d 277, 279-80 (6th Cir. 1981), and 712 F.2d 242, 243-44 (6th Cir. 1983).

[21] Not only are there no conflicting decisions, but the Court and lower federal courts consistently have recognized that treaty-reserved fishing rights include a concomitant right to access traditional fishing grounds. *United States v. Winans*, 198 U.S. 371, 379-84 (1905); *United States v. Oregon*, 718 F.2d 299, 303-04 & n.6 (9th Cir. 1983); *Muckelshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988). *See Seufert Brothers Com-*

ties misrepresent the district court's ruling in attempting to fit this matter into the second category [Rule 10(c)]; *see, e.g.*, the following assertions in the Municipalities' petition seeking a writ of certiorari:

> — "(T)his case radically changes the degree to which the rights of state and local governments and other private property owners are subservient to implied tribal rights." (Pet. 7)
>
> — "(O)ther property owners, both public and private, may be required to allow tribal members to occupy improvements to their real estate." (Pet. 8)
>
> — "(T)he court of appeals *created* a type of right that did not exist in 1836 or 1855—a right to appropriate improvements to real property over which the Tribe does not have title." (Pet. 10)
>
> — "By transforming an access right into a right to occupy off-reservation property, the court of appeals' decision in this case threatens the rights of countless private property owners." (Pet. 16)
>
> — "(A) federal court has now held for the first time that off-reservation property owners must give up occupancy of their real property and improvements to Tribal members . . . ." (Pet. 17)

At first blush these assertions seem to indicate "an important question of federal law," because the specter is raised that private property anywhere along the Great Lakes could be usurped. But the Municipalities' assertions are belied by the fact that the district court's partial summary judgment implemented a compromise advocated by the state defendant (MDNR Director). The State of Michigan (rather than the Municipalities) has the primary responsibility for protecting the interests of private property owners along the Great Lakes. In order to protect these interests and to resolve the Municipalities' con-

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pany v. United States, 249 U.S. 194, 198-99 (1919); *cf. Washington v. Passenger Fishing Vessel Ass'n, supra*, 443 U.S. at 667 & 674.

cern that a favorable court ruling would result in tribal fishing vessels being moored permanently at the public marinas, the MDNR Director proposed a compromise limiting mooring by the Indian Tribe's fishing vessels to the same terms and conditions as are applicable to other transient boats on the Great Lakes utilizing these public marinas.

In the spirit of comity, the Tribe determined to accept the State's proposed compromise; therefore GTB's summary judgment motion requested a declaratory judgment only that tribal fishing vessels be able to use the marinas on the same terms and conditions as other transient boats: "The basic question to be decided by this Court is whether GTB's commercial fishing vessels may moor at these public facilities similar to other transient boaters." [22]

> The issue isn't whether the municipal defendants must "construct or provide access or mooring facilities;" instead, the issue is whether, once constructed, the public marinas may deny GTB use of these facilities (similar to use by other transient boaters) by application of the policy prohibiting commercial use.

R.52: GTB's reply brief filed 6/5/95, at pages 3-4. The Tribe acceded to the MDNR Director's proposed compromise in suggesting that the district court modify the relief requested in paragraph C of the prayer for relief (at pages 10-11) of the First Amended Complaint (R.6) [JA: 32-33]:

> Given the state defendant's position that the provisions prohibiting commercial use contained in the municipal defendants' agreements with the MDNR do not prohibit occasional mooring by tribal fishing vessels, it is not necessary to declare those provisions unenforceable. Instead, declaratory relief should be directed against the municipal defendants' policy/

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[22] R.36: GTB's summary judgment memorandum filed 4/17/95, at page 4 [JA:73].

> custom denying mooring to tribal fishing vessels, which has the effect of depriving plaintiff's members of access to accustomed fishing grounds as well as fishing opportunities assured by paragraphs 24(d), 25 and 26(a) of the March 28, 1985 Agreement For Entry Of Consent Order in the *United States v. Michigan* litigation (W.D. Mich. File No. M26-73) which was entered as an order of this Court on May 31, 1985.

R.60: GTB's supplemental brief filed 7/24/95, at pages 9-10.

The court of appeals specifically noted the narrow scope of the ruling below in affirming the district court's partial summary judgment: "We note that this decision grants only a transient right to moor on an occasional basis in common with the recreational public who also utilize the facilities." 141 F.3d at 642 (Pet. App. A-20). The court below simply did not decide an important question of federal law.

B. The Questions Presented Were Not Decided Below

The Court's 1986 decisions [23] inform parties opposing summary judgment of the risk in failing to "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986). Nonetheless, the Municipalities failed to comply with the FED.R.CIV.P. 56(e) & (f) burdens [24] regarding the facts referenced *supra*, at pages 2-5. Consequently, the Municipalities are precluded from now asserting facts not contained in

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[23] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electronic Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[24] "Rule 56(e) thus makes clear the substantial risk of an adverse judgment to a nonresponding opposing party." 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2739 at 520 (2nd ed. 1983).

the record which are contrary to the established facts upon which summary judgment was premised.

The primary argument proffered in the petition—that the declaratory judgment authorizes GTB members *to occupy private property*—was never decided by the district court. The contention that the partial summary judgment "transform[s] an access right into a right to occupy off-reservation property [and] threatens the rights of countless private property owners" (Pet. 16) is premised upon the unsubstantiated allegation that this case involves private property located outside of the Tribe's reservation, *see* Pet. 3 and 16.[25] In fact, this litigation involves public marinas which the district court found to be within GTB's 1855 Treaty reservation.[26]

Thus there is no basis in the record for the asserted first question that the decision below improperly granted "tribal members the right to occupy public and private lands."[27] Nor does this case present the second question whether the court of appeals "rewrote Treaty pro-

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[25] The Municipalities' assertion that GTB's "reservation lands . . . do not include the lands . . . upon which the marinas now sit" (Pet. 3) is not substantiated by any evidence in the record. To the contrary, the record contains unrefuted evidence that GTB's 1855 reservation includes the on-shore sites where the Leland and Northport public marinas are located. *See* R.36: Affidavit of James M. McClurken, Ph.D. (paragraphs 12-13 at pages 5-6) submitted with GTB's summary judgment motion filed 4/17/95 [JA:98-99]. *Compare* the legal description of GTB's reservation set aside in Article I, clause Fifth of the 1855 Treaty (Pet. App. D-23) with the legal descriptions for the marinas contained in Exhibits A and B to the Municipalities' motion for dismissal/summary judgment filed 4/17/95 (R.38 [JA:220]). The court below affirmed the district court's finding that the "marinas . . . are located within the boundaries of (GTB's) 1855 reservations." 971 F. Supp. at 284 (Pet. App. E1-2), *aff'd* 141 F.3d at 637 (Pet. App. A-3).

[26] *Id.*, 971 F. Supp. at 284 (Pet. App. E1-2), *aff'd* 141 F.3d at 637 (Pet. App. A-3).

[27] Questions Presented (Pet. i).

visions to expand an implied right to fish to include the right to moor." [28]

> It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below. In Hormel v. Helvering, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that the parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by a final decision there of issues upon which they have had no opportunity to introduce evidence."

Singleton v. Wulff, 428 U.S. 106, 120 (1976).

C. Conclusion (Sixth Circuit Case No. 96-1168)

This proceeding does not involve an important question of federal law which should be settled by the Court because the partial summary judgment declares only that GTB's fishing rights [29] include a profit *a pendre* [30] upon the precise locations of the Leland and Northport public marinas by virtue of the Tribe's documented historic utilization of these sites as well as their reservation in the July 31, 1855 Treaty with the Ottawa and Chippewa, 11 Stat. 621.[31] The district court specifically refrained from granting the relief which the Municipalities contend is the justification for the writ of certiorari.[32]

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[28] Questions Presented (Pet. i). *See* 141 F.3d at 641 (Pet. App. A-16), and 971 F. Supp. at 292 (Pet. App. E1-26).

[29] *See United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

[30] *See* 141 F.3d at 639 n.9 (Pet. App. A-10); *see also United States v. Winans, supra*, 198 U.S. at 379-81, and *United States v. Michigan, supra*, 471 F. Supp. at 276.

[31] *See* 141 F.3d at 637 and n.2 & 638-39 and n.9 (Pet. App. A-3 thru A-4 and A-9 thru A-11).

[32] 971 F. Supp. at 292 (Pet. App. E1-26).

The partial summary judgment affirmed by the court of appeals merely confirms that GTB fishers may utilize the transient mooring slips at the public marinas which are available on a first-come, first-serve basis to all boats on the Great Lakes.[33] To deny tribal vessels utilization of these transient mooring slips on the grounds that it amounts to an impermissible "right to occupy public and private lands" [34] would be akin to depriving Rosa Parks of a seat on a public bus on the grounds that she had no right to occupy municipal property.

II. SIXTH CIRCUIT CASE NO. 96-2396

A. Attorney's Fees Award Was Premised Upon An Alternate Basis Consistent With The Court's Decisions

The Municipalities assert that the attorney's fees award was premised improperly upon a treaty-interpretation claim not involving enforcement of a clearly defined right, citing the distinction between actions brought to interpret treaty rights and actions brought to enforce previously declared treaty rights discussed in *United States v. Washington*, 935 F.2d 1059, 1061 (9th Cir. 1991). The court below noted that the cases are distinguishable.[35] Regardless, review by the Court is not warranted because the award of attorney's fees was predicated upon an alternate basis not discussed in the petition.

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33 141 F.3d at 642 (Pet. App. A-20). There is evidence in the record that other commercial vessels utilize the Municipalities' marinas on a transient basis without objection. 141 F.3d at 641 (Pet. App. A-16). *See also* R.62: Affidavit of John Robertson (paragraph 13 at pages 7-8) submitted with the MDNR Director's brief filed 7/31/95 [JA:370-71].

34 Questions Presented (Pet. i).

35 Pet. App. B-8 thru B-9 and n.4; *see* Pet. App. E6-4 thru E6-5 and E4-10 thru E4-11.

> Petitioner ignores the fact that respondent did allege constitutional claims which the District Court and the Court of Appeals both found to be sufficiently substantial to support federal jurisdiction under *Hagans v. Lavine*, 415 U.S. 528.

Maher v. Gagne, 448 U.S. 122, 128 n.10 (1980).

In addition to asserting federal question jurisdiction for the claims upon which summary judgment was premised, the Tribe's complaint invoked jurisdiction under 28 U.S.C. § 1343(a)(3) for a cause of action authorized by 42 U.S.C. § 1983 claiming violation of rights guaranteed by the Fourteenth Amendment resulting from tribal fishing vessels being deprived the opportunity to utilize transient mooring generally available to the public. *See* R.6: First Amended Complaint, paragraphs 1(a) and 26 at pp. 1 and 10, Apx. at pp. 27 and 36; *see also Maher v. Gagne, supra*, 448 U.S. at 125. The court of appeals affirmed the district court's ruling that this unaddressed § 1983 claim was a proper basis for the award of attorney's fees under 42 U.S.C. § 1988.[36] This independent basis for the award doesn't depend upon the predicate that GTB's fishing rights must already have been interpreted to include a concomitant right to access traditional fishing grounds from public locations historically utilized by the Indian Tribe. *Cf. id.*, 448 U.S. at 132 n.15.

B. GTB Is Prevailing Party With Respect To Unaddressed § 1983 Claim Premised On Fourteenth Amendment Due Process And Liberty Interests

The Civil Rights Attorney's Fees Awards Act of 1976 (codified as an amendment to 42 U.S.C. § 1988) authorizes courts to award "the prevailing party . . . a reasonable attorney's fee as part of the costs" in civil actions brought pursuant to 42 U.S.C. § 1983. *Maher v. Gagne, supra*, 448 U.S. at 124-25 and ns. 1 & 6. An attorney's

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[36] Pet. App. B-8 thru B-12, *see* Pet. App. E4-5 thru E4-10.

fee award is not dependent upon litigating the fee-generating § 1983 claim to conclusion. *Id.*, 448 U.S. at 129.

> The legislative history also makes clear that the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success.

Smith v. Robinson, 468 U.S. 992, 1007 n.10 (1984) (citations omitted).

1. *Deprivation of liberty interest*

One of the Tribe's members was deprived of his liberty by the Village of Northport when he was arrested for mooring his fishing vessel at the public marina on July 2, 1993; and Leland Township threatened to have him arrested for the same offense when he moored his vessel at the public marina in September, 1994.[37] This violated a liberty interest guaranteed by the Fourteenth Amendment not only because the tribal member was arrested, jailed overnight and prosecuted for criminal trespass, but also because the effect of the arrest (at Northport) and threatened arrest (at Leland) was to deprive GTB-licensed fishers of their freedom to choose and pursue the career of their choice, which incidentally involves the exercise of "federally created and federally protected rights." [38]

> The constitutional interests protected by due process—said to find their origins in the *Magna Carta, see Hurtado v. California,* 110 U.S. 516, 531, 4

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[37] 141 F.3d at 638 (Pet. App. A-7). *See* R.36: Exhibit 13 and Affidavit of George Arthur Duhamel [paragraphs 7 and 9-11 at pp. 3-5] submitted with GTB's summary judgment motion, Apx. at pp. 157 & 131-33. *See also* R.10: admission in paragraph 20(b) contained in the Municipalities' answer to amended complaint, Apx. at p. 74.

[38] *United States v. Michigan, supra,* 653 F.2d at 278.

> S.Ct. 111, 118, 28 L.Ed. 232 (1884)—are "life, liberty and property." Our method of inquiry is to determine first whether plaintiffs' interests are entitled to protection and second whether defendants violated the process due them.
>
> Liberty and property interests are intricately related in our system of political economy, a system based on free choice of careers and occupations, private property, and the right to compete. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed. 2d 424 (1972) (Justice Stewart for the Court observed that "a fundamental interdependence exists between the personal rights to liberty and the personal right to property.") A complex of rights and duties characterizes any particular liberty or property interest. Generally speaking, freedom to choose and pursue a career, "to engage in any of the common occupations of life," *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), qualifies as a liberty interest which may not be arbitrarily denied by the State.

Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983). The district court's partial summary judgment was premised upon findings of undisputed facts that GTB fishers were being deprived of the ability to harvest fish from traditional fishing areas by the denial of mooring at the Leland and Northport marinas.[39] The court of appeals concluded that this deprivation may serve as a basis for constitutional relief, citing *id.*, 699 F.2d at 328, *Greene v. McElroy,* 360 U.S. 474, 492 (1959), and *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238 (1957). Pet. App. B-11 thru B-12.

2. *Deprivation of property right*

"The right to enjoy property without unlawful deprivation, . . . is in truth a 'personal' right," which is cogniza-

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[39] 971 F. Supp. at 290-91 (Pet. App. E1-18 thru E1-21), *aff'd* 141 F.3d at 639-40 (Pet. App. A-11 thru A-13).

ble under 42 U.S.C. § 1983. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Denying GTB access to traditional fishing grounds accessible from the Leland and Northport sites historically utilized by tribal ancestors had the effect of depriving GTB of a property right protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[40] *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410-13 (1968). The court of appeals affirmed the district court's determination that this constitutional claim is substantial. Pet. App. B-10 thru B-11.

3. *Non-fee claims reasonably related to unaddressed § 1983 claim*

Respondent GTB clearly is a "prevailing party" within the meaning of 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433 and ns. 7 & 8 (1983); *see Farrar v. Hobby*, 506 U.S. 103, 109-12 (1992). Although the ruling below was not premised upon GTB's § 1983 claim seeking to vindicate deprivation of the constitutionally-protected liberty interest and property right, attorney's fees were properly awarded pursuant to 42 U.S.C. § 1988 because "plaintiff . . . prevailed on one of two or more alternative bases for relief . . . (which) are reasonably related to the plaintiff's ultimate success." *Smith v. Robinson, supra*, 468 U.S. at 1007 n.10. The legislative history of § 1988 confirms that an attorney's fees award may be premised upon the unaddressed § 1983 claim if it meets the "substantiality" test[41] which requires a finding that this

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[40] "The Tribes' right to take fish is a property right, protected under the fifth amendment." *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) [citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 & 412 (1968)].

[41] *See Hagans v. Lavine*, 415 U.S. 528, 536-39 (1974).

claim involves a "common nucleus of operative fact" [42] as the claims upon which the partial summary judgment was based.[43] *Maher v. Gagne, supra,* 448 U.S. at 132 n.15. The court of appeals followed the Court's decisions in concluding that the non-fee claims upon which the district court's declaratory judgment was premised and the unaddressed constitutional claim are based upon a common core of facts and involve similar legal theories. Pet. App. B-9 thru B-12; *see* Pet. App. E4-3 thru E4-7.

C. GTB Also Could Be Considered Prevailing Party Under 42 U.S.C. § 1988 With Respect To The Claim Arising Under The Treaty Of 1836

Attorney's fees are warranted pursuant to § 1988 for actions brought to enforce previously interpreted rights. *United States v. Washington, supra,* 935 F.2d at 1061. The relevant inquiry is whether the ruling below *interpreted* Indian treaty rights or merely *enforced* previously declared treaty rights. Contrary to the Municipalities' contention, the "Treaty claim" [44] involved enforcement of the off-reservation fishing rights previously affirmed by the court of appeals in the related *United States v. Michigan* litigation.[45]

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[42] *See United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966).

[43] The ruling below was premised upon claims arising under the 1836 Treaty and 1985 consent decree in the related *United States v. Michigan* litigation. 971 F. Supp. at 293 (Pet. App. E1-29 thru E1-30); *see* 141 F.3d at 638-42 (Pet. App. A-8 thru A-20).

[44] The cause of action arising directly under the March 28, 1836 Treaty with the Ottawa and Chippewa (7 Stat. 491) premised upon federal question jurisdiction was described by the district court as the "Treaty claim." 971 F. Supp. at 284 & 287 (Pet. App. E1-11 & E2-1). An alternate jurisdictional basis for this claim was asserted under 28 U.S.C. § 1343(a)(3) for a cause of action premised upon 42 U.S.C. § 1983. *See* R.6: First Amended Complaint, paragraphs 1(a) and 26 at pp. 1 and 10, Apx. at pp. 27 and 36.

[45] *United States v. Michigan,* 471 F. Supp. 192, 278-81 (W.D. Mich. 1979), *aff'd* 653 F.2d 277 (6th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981).

These fishing rights declared by the district court in 1979 include the right to access traditional fishing locations necessary to exercise the rights:

> Indian title to lands has never been a fee; it has always been a right to use and occupy lands claimed by the United States. This interest in land gives the tribes holding it the right to fish, hunt, gather fruits and cross the land. It is analogous to a profit a pendre or an easement. *United States v. Winans, supra.* The Indians reserved such an interest in land by the Treaty of 1836.

United States v. Michigan, supra, 471 F. Supp. at 276. Utilization of the launching ramps and transient mooring slips at the public marinas on the same terms and conditions as other transient boats is merely a concomitant aspect of the previously confirmed fishing rights. *United States v. Winans, supra,* 198 U.S. at 380-84; *see* 971 F. Supp. at 288-89 (Pet. App. E1-13 thru E1-18), and 141 F.3d at 639 (Pet. App. A-10 thru A-13). Thus the award of attorney's fees also could have been premised directly upon the "Treaty claim" as an unaddressed cause of action arising under 42 U.S.C. § 1983. *See* Pet. App. B-8 thru B-9 and ns. 4-5, and Pet. App. E4-10 thru E4-11 & Pet. App. E6-4 thru E6-6.

CONCLUSION

(Sixth Circuit Case Nos. 96-1168 and 96-2396)

The foregoing discussion demonstrates that the questions presented in the Municipalities' petition misrepresent the court of appeals' decisions, which neither conflict with other decisions nor involve an important federal question that should be settled by the Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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